

2001

Dialogue on the Practice of Law and Spiritual Values

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Recommended Citation

James F. Henry, Joseph Allegretti, Robert A. Baruch Bush, and Dr. Sarah Cobb, *Dialogue on the Practice of Law and Spiritual Values*, 28 Fordham Urb. L.J. 991 (2001).

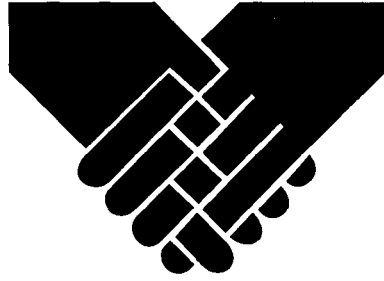
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Dialogue on the Practice of Law and Spiritual Values

Cover Page Footnote

* James F. Henry is the founder and President Emeritus of the CPR Institute for Dispute Resolution. Mr. Henry is a Fellow of the American Bar Association and a past member of the Board of Visitors of the John F. Kennedy School of Government at Harvard University. He also served as a member of the White House Task Force on Private Initiatives. He is a graduate of Williams College and Georgetown University Law Center.



**DIALOGUE ON THE PRACTICE OF LAW AND
SPIRITUAL VALUES**

A DIALOGUE SPONSORED BY THE CPR INSTITUTE
FOR DISPUTE RESOLUTION AND THE LOUIS STEIN
CENTER FOR LAW AND ETHICS AT FORDHAM
UNIVERSITY SCHOOL OF LAW

DIALOGUE ON THE PRACTICE OF LAW AND SPIRITUAL VALUES

*A Dialogue Sponsored by the
CPR Institute for Dispute Resolution and the
Louis Stein Center for Law and Ethics at
Fordham University School of Law*

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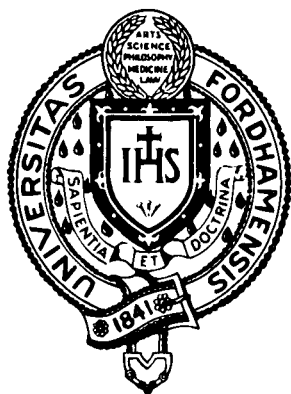
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INTRODUCTORY REMARKS

*James F. Henry**

Good Morning. I am Jim Henry, President Emeritus of the CPR Institute for Dispute Resolution. We are going to have a Dialogue on the relationship of moral values to the methods that we employ to resolve legal conflicts, whether by litigation, negotiation, or alternative dispute resolution—many prefer the term “appropriate dispute resolution”—or “ADR.”

Organization of this Dialogue is a joint effort of CPR and the Louis Stein Center for Law and Ethics at Fordham University School of Law. More specifically, it is the result of the considerable abilities and competence of Professor Russell Pearce, Co-Director of the Stein Center; Professor Jackie Nolan Haley, also of Fordham Law; and Peter Kaskell, Senior Fellow of the CPR Institute. This effort also draws on some outstanding publications of Professors Joseph Allegretti and Baruch Bush.

I have long believed that some examination of our basic, largely religious, values was important. As commercial suits, increasing numbers of domestic disputes, and even policy conflicts become rougher and tougher, the need to get our basic values in focus seems all the more essential.

At the same time, an examination of basic values and conflict seems requisite in building a complete understanding of ADR. Although the benefits of ADR originally were perceived in tangible terms, such as cost-cutting, ADR has evolved toward a recognition of less tangible qualities, such as the benefit of better relationships, transformative potential, and behavioral tools such as the effectiveness of apology. At the same time, we are discovering in the practice of ADR moral and ethical problems that we did not even know existed a few years ago.

The purpose of this Dialogue is to commence a conversation. Our task is to translate the thought and language of the religious moralists into words that are understood by lawyers who represent clients in the civil system, who litigate and attempt to resolve con-

* James F. Henry is the founder and President Emeritus of the CPR Institute for Dispute Resolution. Mr. Henry is a Fellow of the American Bar Association and a past member of the Board of Visitors of the John F. Kennedy School of Government at Harvard University. He also served as a member of the White House Task Force on Private Initiatives. He is a graduate of Williams College and Georgetown University Law Center.

flict in an imperfect system and society. To that end, we convened a distinguished panel to mull approaches the world's religions take to solving conflicts. The panelists' presentations then will be anchored in today's practice by three attorneys who will provide remarks in response.

An examination of our basic values and our application of them can be sensitizing, but at the same time, somewhat sensitive. If the discussion generates doubt, disagreement, guilt, or even irritation, it means that we have stimulated some thought and commenced a conversation. Doing so through this Dialogue, in my judgment, is an extremely worthwhile venture.

A CHRISTIAN PERSPECTIVE ON ALTERNATIVE DISPUTE RESOLUTION

Joseph Allegretti*

In 1985, during the early days of the alternative dispute resolution ("ADR") movement, law professors Andrew McThenia and Thomas Shaffer wrote an important article in which they claimed that ADR should be supported for reasons other than cost-cutting and time-saving.¹ Instead, they argued that ADR was rooted in the religious cultures of Judaism and Christianity. They wrote, "It is from Torah and Gospel . . . that we are most likely to be able to sketch out radical alternatives to the law's response to disputes. As a matter of fact, our religious culture contains both a theoretical basis for these alternatives and a way to apply theory to disputes."²

This essay will examine and elaborate upon this claim. Following McThenia and Shaffer, I will consider two questions: First, why and how does Christianity provide a theoretical justification for ADR? Second, what can Christianity teach us about the application and practice of ADR?

A CHRISTIAN JUSTIFICATION FOR ADR

A Christian approach to ADR begins with the words and example of Jesus, because Christians believe that they are called to model their life on his.³ Through his words and deeds Jesus teaches that the reign of God—a reign that already has begun—is characterized by peace, love, and the forgiveness of enemies.

Consider just a few of Jesus' teachings. In his Sermon on the Mount, Jesus proclaims, "Blessed are the peacemakers/for they will be called children of God."⁴ Peacemaking cannot be divorced

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1. Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985).

2. *Id.* at 1665.

3. STANLEY HAUERWAS, *THE PEACEABLE KINGDOM: A PRIMER IN CHRISTIAN ETHICS* 75-76 (1983) ("[C]hristian ethics is not first of all an ethics of principles, laws, or values, but an ethic that demands we attend to the life of a particular individual—Jesus of Nazareth.").

4. *Matthew* 5:9. All biblical quotations are taken from the NEW REVISED STANDARD VERSION.

from love. According to Jesus, the two greatest Commandments are to love God and love your neighbor as yourself.⁵ Christians are called to a selfless love that extends even to enemies:

You have heard that it was said, "An eye for an eye and a tooth for a tooth." But I say to you, Do not resist an evildoer. But if anyone strikes you on the right cheek, turn the other also; and if anyone wants to sue you and take your coat, give your cloak as well; and if anyone forces you to go one mile, go also the second mile. . . . You have heard that it was said, "You shall love your neighbor and hate your enemy." But I say to you, Love your enemies and pray for those who persecute you.⁶

Christian theologians continue to debate how best to interpret these words, and Christians continue to disagree about how best to live by them. However, few would deny that Jesus is exhorting his followers to live out a new way of life.⁷ As Professor Allen Verhey explains, "The reign of God that Jesus is announcing and already manifesting, shapes and requires certain character traits: submissiveness to his reign, humility, the longing for the vindication of the right, mercy, sincerity, and the disposition for peace."⁸

At the very least, then, Christians are called to be peacemakers and healers of human conflict. They should bear wrongs patiently. Reconciliation should replace retaliation. This suggests that Christians should be predisposed to support methods of conflict resolution that emphasize non-violence, forgiveness, and connectedness between persons.

Another passage from the *Gospel of Matthew* speaks of how Christians are to resolve disputes within their community:

If another member of the church sins against you, go and point out the fault when the two of you are alone. If the member listens to you, you have regained that one. But if you are not listened to, take one or two others along with you, so that every word may be confirmed by the evidence of two or three witnesses. If the member refuses to listen to them, tell it to the church; and if the offender refuses to listen even to the church, let such a one be to you as a Gentile and a tax collector.⁹

5. Mark 12: 28-34; see also Luke 10:25-37 (explicating Jesus' proclamation of the law of love through the Parable of the Good Samaritan—an illustration of the kind of neighbor-love that Christians are called to practice).

6. Matthew 5:38-41, 43.

7. ALLEN VERHEY, THE GREAT REVERSAL: ETHICS AND THE NEW TESTAMENT 86-87 (1984).

8. *Id.* at 86.

9. Matthew 15:17-18.

This process for settling disputes within the community of faith involves several steps.¹⁰ The first step is communication. The second is what today we call mediation—involving another community member as go-between. Then, if mediation fails, the dispute is presented to the larger community for guidance. Only if the member still refuses to listen—and now is regarded as an “offender”—should the Church expel him from membership.

But even that is not the end of the story. Jesus puts these rules on Church discipline in their proper perspective through his teachings on forgiveness. Peter the Apostle asks, “Lord, if another member of the church sins against me, how often should I forgive? As many as seven times?”¹¹ Jesus responds, “Not seven times, but, I tell you, seventy-seven times.”¹² Christians should interpret rules for conflict-resolution in light of the overriding obligation to love and forgive one another without limit.¹³

Not only the words of Jesus but also his actions are normative for Christians. In his life and death, Jesus lived out the sayings of the Sermon on the Mount. He did not return evil for evil. He did not resist or retaliate when he was seized and sentenced to die. As the Roman Catholic bishops of the United States put it:

In all his suffering, as in all of his life and ministry, Jesus refused to defend himself with force or with violence. He endured violence and cruelty so that God’s love might be fully manifest and the world might be reconciled to the One from whom it had become estranged. Even at his death, Jesus cried out for forgiveness for those who were his executioners: “Father, forgive them”¹⁴

Law professor Robert Taylor makes the same point humorously: “It does give one ample pause for reflection to imagine our Lord surrounded by a bevy of attache case-carrying attorneys zealously striving to procure from Rome and the Sanhedrin every legal remedy, if any, to which the Crucified One would have been entitled.”¹⁵

10. See McThenia & Shaffer, *supra* note 1, at 1666 (finding a system of dispute resolution in the Gospel of Saint Matthew, involving conversation, mediation, “airing the dispute before representatives of the community,” and finally, judgments).

11. *Matthew* 18:21.

12. *Id.* at 18:22.

13. WOLFGANG SCHRAGE, *THE ETHICS OF THE NEW TESTAMENT* 149 (David E. Green trans., Fortress Press 1988).

14. NAT’L CONFERENCE OF CATHOLIC BISHOPS, *THE CHALLENGE OF PEACE: GOD’S PROMISE AND OUR RESPONSE* 16 (1983) (quoting *Luke* 23:34).

15. Robert D. Taylor, *Toward a Biblical Theology of Litigation: A Law Professor Looks at 1 Cor. 6:1-11, 2 Ex Auditu* 105, 108 (1986).

One other passage from the Christian Scriptures should be mentioned. In the First Letter to the Corinthians, Saint Paul criticizes Christians who resort to the secular legal system.¹⁶ Christians should not bring their disputes with each other to the pagan courts. Surely someone in the Church is wise enough to resolve these conflicts. Paul concludes, "In fact, to have lawsuits at all with one another is already a defeat for you. Why not rather be wronged? Why not rather be defrauded? But you yourselves wrong and defraud—and believers at that."¹⁷

As with most Scripture, this passage can be read in a variety of ways. Some interpret it to bar all lawsuits by Christians, others to bar all lawsuits between Christians.¹⁸ But even if the passage is not read literally, it still can be taken seriously.¹⁹ At its core, Paul's Letter to the Corinthians lays down two basic principles.²⁰ First, Paul adopts a strong *pro-mediation* view by insisting that Christians should resolve their disputes with each other internally, within the Church, rather than in the secular courts.²¹ Second, Paul adopts an *anti-litigation* stance by claiming that it would be better for Christians to suffer wrongdoing rather than vindicate their legal rights in court.²²

In a masterful exegesis of 1 *Corinthians* 6, the great Reformation theologian John Calvin argues that Christians should view litigation as a last resort.²³ In general, Christians should avoid the

16. 1 *Corinthians* 6:1-8.

17. *Id.* at 6:7-8.

18. KEN SANDE, *THE PEACEMAKER: A BIBLICAL GUIDE TO RESOLVING PERSONAL CONFLICT* 221-26 (1991).

19. As I have explained elsewhere, I do not read Saint Paul as establishing an absolute prohibition on Christians resorting to the secular legal system. 1 *Corinthians* 6 should be read against the backdrop of the problems that were plaguing the Christian community in Corinth when Paul wrote his Epistle. JOSEPH ALLEGRETTI, *THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* 84-85 (1996).

20. Taylor, *supra* note 15, at 105. I am indebted to Taylor for the labels "pro-mediation" and "anti-litigation" to express the core of Paul's teaching in 1 *Corinthians* 6.

21. Taylor, *supra* note 15, at 105; *see also* LYNN R. BUZZARD & LAURENCE ECK, *TELL IT TO THE CHURCH: RECONCILING OUT OF COURT* 39 (1982) (arguing that *Matthew* 18 and 1 *Corinthians* 6 support a biblical model of dispute settlement, and discussing efforts to create conciliation centers in which Christians can bring their disputes to obtain a non-legal remedy); INST. FOR CHRISTIAN CONCILIATION, *CHRISTIAN CONCILIATION HANDBOOK* 16 (1994) (setting out procedures for biblically-based conciliation process).

22. *Id.*

23. *See* Joseph Allegretti, "In All This Love Will Be The Best Guide": John Calvin on the Christian's Resort to the Secular Legal System, 9 J.L. & RELIGION 1 (1991) (examining Calvin's reading of 1 *Corinthians* 6).

courts. Litigation fractures the community, impairs the bonds of love that should unite all persons, belies the teaching of Jesus to bear wrongs patiently, and breeds vices such as greed and revenge in the litigants. Nevertheless, Calvin allows litigation in the exceptional case when it can be undertaken without violating the fundamental command to love God and neighbor. Calvin's emphasis on the primacy of love and healing dovetails nicely with some strands of the ADR movement.²⁴

What does this brief analysis of Christian Scripture teach us? What lessons can we draw from it? We should beware of making grandiose claims on the basis of a superficial reading of scanty evidence. Nevertheless, we can safely make several conclusions. Christians should follow the teaching and examples of Jesus by eschewing violence and promoting peace. They should value reconciliation and the healing of the human community more than the vindication of their legal rights. Christians always should go the extra mile when it comes to resolving conflicts.

Furthermore, Christians should be skeptical of litigation as a way to resolve problems and should seek creative alternatives. Although sometimes warranted, litigation too often separates rather than unites, engenders hate and greed rather than love, and emphasizes winning rather than reconciliation. As Taylor puts it, litigation at its worst "is a fight unto death in which irreparable harm (economic, psychological, and spiritual) is done to parties; but mediation, by contrast, makes room for compromise and human growth."²⁵ In short, Christians have good reasons for supporting ADR, reasons rooted not in efficiency but in Gospel values.²⁶

A CHRISTIAN APPROACH TO ADR

Now that I have sketched broadly a Christian rationale for ADR, I want to explore what form a Christian approach to ADR might take. Does Christianity have anything distinctive to contrib-

24. See *infra* text accompanying notes 37-39, 45-46.

25. Taylor, *supra* note 15, at 109; see also Wayne Brazil, *The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice*, 3 J. LEGAL PROF. 107 (1978-79) (arguing that litigation can have negative effects on the moral and psychological lives of lawyers; the gameplaying, deception, and amorality that characterize litigation can spread to other areas of life, infecting relationships with family and friends).

26. But see Robert D. Benjamin, *Negotiation and Evil: The Sources of Religious and Moral Resistance to the Settlement of Conflicts*, 25 MEDIATION Q. 245 (1998) (arguing that some Christian beliefs create resistance to ADR).

ute to the ADR process? What would a Christian approach to ADR look like?

Fortunately, I have a story that may help to answer these questions. This is a story about one of the most beloved saints in the Christian Church, Saint Francis of Assisi.²⁷ It is the story of when Francis was called upon to mediate a violent dispute between the town of Gubbio and one very hungry wolf.²⁸

A fierce wolf was terrorizing the town of Gubbio. The wolf, driven mad by hunger, was devouring both animals and human beings. Francis, who was visiting Gubbio, took pity on the townspeople. Despite the warnings of the people, he went out to meet the wolf, alone, unarmed, protected only by his faith in God. When he encountered the wolf, Francis gave the creature a stern lecture: "Brother Wolf, you have done great harm in this region, and you have committed horrible crimes by destroying God's creatures without any mercy."²⁹ For its crimes, the wolf deserved to die.

But Francis sought a different kind of solution. He realized that the wolf was driven to kill out of hunger. "But, Brother Wolf, I want to make peace between you and them, so that they will not be harmed by you any more, and after they have forgiven you all your past crimes, neither men nor dogs will pursue you any more."³⁰

When the wolf showed by its gestures that it accepted Francis's intervention, Francis suggested a compromise. If the wolf agreed not to kill any more animals or people, the townspeople of Gubbio would feed it each day. The wolf indicated its acceptance of the compromise by extending its paw. When Francis returned to town with the wolf at his side, the people were amazed at how gentle the wolf acted. Francis then preached to the people and told them that the wolf's attacks were in response to their sins. The townspeople quickly consented to the agreement made between Francis and the wolf. From that day on, both parties lived up to their promises. The townspeople fed the wolf, and the wolf became so peaceful that dogs would not even bark at it. When the wolf died, the townspeople mourned its passing.

27. Other scholars also have found lessons for the mediation process in the life of Saint Francis. See F. Matthews-Giba, *Religious Dimensions of Mediation*, 27 *FORDHAM URB. L.J.* 1695 (2000) (examining the religious roots of mediation, with emphasis on Francis and the Franciscan Order).

28. *ST. FRANCIS OF ASSISI, WRITINGS AND EARLY BIOGRAPHIES: ENGLISH OMNIBUS OF THE SOURCES FOR THE LIFE OF ST. FRANCIS 1348-51* (Marion A. Habig, ed. 1991) (recounting the story of the wolf at Gubbio).

29. *Id.* at 1349.

30. *Id.*

What can we—modern, sophisticated, tough-as-nails lawyers and businesspeople—learn from this medieval miracle story? Jim McIntosh uses the story to illustrate the essential elements of Franciscan peacemaking.³¹ The story also can serve as the foundation for a Franciscan—or, more broadly, a Christian—approach to ADR in general and mediation in particular. Several elements of the story can provide practical guidance to Christians involved in mediation whether as a party, lawyer, or mediator.

First, notice that Francis goes out to meet the wolf unarmed.³² He acts non-violently. In the Middle Ages this meant going forth without sword or shield. But violence comes in many forms—in the context of mediation, violence can include explicitly or implicitly pressuring parties to reach a certain outcome, avoiding options that the mediator does not favor, failing to listen to the parties, bracketing certain painful issues, assuming the worst (e.g., he is only in it for the money) rather than the best (e.g., he is trying to do what he thinks is right) about a party.³³ A Christian approach to mediation would attempt to avoid these forms of violence. It would honor the parties and recognize that their life decisions must rest in their hands. This is in keeping, of course, with the Christian understanding that all human beings are of unconditional value because they are created in the image and likeness of God.³⁴

Second, Francis is interested in the growth of the parties as much as in the specifics of a settlement.³⁵ He is less concerned with splitting the difference than with forging a new relationship in which the parties can flourish. He wants a solution that will be good for both parties, not just temporarily, but permanently. “From that day, the wolf and the people kept the pact which Saint Francis made. The wolf lived two years more, and it went from door to door for food. It hurt no one, and no one hurt it.”³⁶ Like Francis,

31. Jim McIntosh, OFM, *Learning at Gubbio*, at <http://www.wtu.edu/franciscan/pages/misc/justice/lgubbio.html> (last modified Oct. 19, 2000). According to McIntosh, the essential elements of Franciscan peacemaking are: “(1) it requires active work; (2) it is nonviolent; (3) it is Christ-centered; (4) it requires meeting all as brother and sister; (5) it brings about reconciliation; (6) the resolution must be a just one.” *Id.* I have adapted McIntosh’s model when developing my own list of the elements of Christian mediation. Although our models are not identical, I owe much to his approach.

32. ST. FRANCIS OF ASSISI, *supra* note 28, at 1348.

33. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 63-68 (1994) (discussing the ways mediators exert influence over settlements).

34. *Genesis* 1:26-27.

35. McIntosh, *supra* note 31.

36. ST. FRANCIS OF ASSISI, *supra* note 28, at 1351.

the Christian in mediation should look beyond positions and interests to get at the real issues troubling the parties and blocking them from living fully and freely. The hope is that the parties will move beyond their hates and fears, find the courage to forgive themselves and each other, and become more caring and compassionate.

Some mediators already adopt this approach. Robert Baruch Bush and Joseph Folger, for example, argue that the goal of mediation should not be merely to improve the parties' situation but to improve the parties themselves.³⁷ A successful mediation is one "when the parties as persons are changed for the better, to some degree, by what has occurred in the mediation process."³⁸ Likewise, mediator Zena Zemeta argues that mediation can be a spiritual experience if the focus is put on restoring human connectedness and healing the rupture that divides the parties.³⁹

Third, Francis encouraged each party to see the situation from the other's point of view.⁴⁰ Why was there a conflict between the wolf and the townspeople? Because the wolf was devouring the people. Why was the wolf killing the people? Because it was hungry. But why was the wolf hungry? McIntosh explains that "[t]he townspeople had enough to ea[t], while the wolf outside their walls was starving. Although the townspeople probably thought of themselves as victims of unprovoked violence and while there certainly can be no excuse for the wolf's behavior, it was the townspeople's unwillingness to share their food that was in part the cause for the conflict."⁴¹

Francis understood that the townspeople were partially responsible for the problem, and preached to them that the wolf's attacks were caused by their sins.⁴² A Christian approach to mediation would encourage each party to move beyond narrow self-interest, understand what is motivating the other side, and acknowledge the legitimacy of the other party's concerns. For a true and lasting reconciliation, each party must enter imaginatively into the world of the other. As attorney Atticus Finch says, in *To Kill a Mockingbird*, "You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it."⁴³

37. BUSH & FOLGER, *supra* note 33, at 84.

38. *Id.*

39. Zena D. Zumeta, *Spirituality and Mediation*, 11 *MEDIATION Q.* 25 (1993).

40. McIntosh, *supra* note 31.

41. *Id.*

42. ST. FRANCIS OF ASSISI, *supra* note 28, at 1350.

43. HARPER LEE, *TO KILL A MOCKINGBIRD* 30 (Warner Books 1982) (1960).

In this way, the mediator also shows a concern for justice. True peace presupposes justice.⁴⁴ An unjust agreement only engenders further conflict. By encouraging the parties to see the best in each other, rather than the worst, the mediator helps them to arrive at an agreement that embraces the concerns of both parties and is therefore fair to each.

One thing should be obvious from our study of Saint Francis. I am not suggesting that Christians should blindly support all forms of ADR. Arbitration, for example, often offers little room for reconciliation and forgiveness. Nor are all approaches to mediation equal. When mediation is seen as merely a way to save time, cut costs, or even to maximize the interests of the parties, it falls short of the Gospel values lived and taught by Jesus and illustrated by the story of Francis.

On the other hand, the so-called *transformative approach* to mediation is based upon a respect for the human self and a commitment to reconciliation that is in harmony with Christian values.⁴⁵ Robert Baruch Bush and Joseph Folger explain that in this model:

Transformation . . . involves changing not just situations but people themselves, and thus the society as a whole. It aims at creating "a better world," not just in the sense of a more smoothly or fairly working version of what now exists but in the sense of a different kind of world altogether. The goal is a world in which people are not just better off but better: more human and more humane. Achieving this goal means transforming people from dependent beings concerned only with themselves (weak and selfish people) into secure and self-reliant beings willing to be concerned with and responsive to others (strong and caring people). The occurrence of this transformation brings out the intrinsic good, the highest level, within human beings. And with changed, better human beings, society as a whole becomes a changed, better place.⁴⁶

To help people become more human and more humane is a goal shared by Christians. This is an approach to ADR that Christians can—and should—support with enthusiasm.

Of course, there is one way in which a distinctively Christian approach to mediation must differ even from the transformative model of Bush and Folger. Return to the story of Francis and the

44. As Pope Paul VI wrote, "If you want Peace, work for Justice." OFFICIAL CATHOLIC TEACHINGS: SOCIAL JUSTICE 312 (Rev. Vincent P. Mainelli ed., 1978).

45. BUSH & FOLGER, *supra* note 33.

46. *Id.* at 29.

wolf. Notice that everything Francis does is rooted in his understanding of himself as a follower of Jesus. As Francis goes out to meet the wolf, we are told that he "placed his hope in the Lord Jesus Christ who is master of all creatures."⁴⁷ He is protected not by sword or shield but by the Sign of the Cross. When Francis approaches the wolf, he speaks "[i]n the name of Christ."⁴⁸ The "power of God"⁴⁹ causes the ferocious wolf to back down. When the townspeople accept the pact with the wolf, "they all shouted to the sky, praising and blessing the Lord Jesus Christ who had sent Saint Francis to them"⁵⁰ And the story ends with the benediction, "Praised be Our Lord Jesus Christ. Amen."⁵¹

Ultimately, things are not in our hands, they are in God's. Peace and justice are God's gifts. Our task is to be faithful to God, knowing that God's ways are not our ways, yet trusting that the God we follow is a God of love, peace, and justice. We are not the stars of the story, but we have an important role to play. Healing happens through the "power of God,"⁵² but we can be the instruments of that power. We can be the channels of that grace. In the words of the beautiful prayer often ascribed to Saint Francis, "Lord, make me an instrument of your peace; where there is hatred, let me sow love; where there is injury, pardon."⁵³ This, we might say, is the prayer of the Christian in mediation.

47. ST. FRANCIS OF ASSISI, *supra* note 28, at 1348.

48. *Id.* at 1349.

49. *Id.*

50. *Id.* at 1351.

51. *Id.*

52. *Id.* at 1349.

53. JOHN MICHAEL TALBOT WITH STEVE RABEY, THE LESSONS OF ST. FRANCIS: HOW TO BRING SIMPLICITY AND SPIRITUALITY INTO YOUR DAILY LIFE 210-11 (1997).

MEDIATION AND ADR: INSIGHTS FROM THE JEWISH TRADITION

*Robert A. Baruch Bush**

Two initial points will provide some context for these remarks. First, my primary professional involvement has been not in legal practice as such, but in alternative dispute resolution (“ADR”) and mediation, which has been my field of concentration over the last twenty-five years, both before and after coming to Hofstra Law School. Therefore, my comments will focus on how my view of this field has been affected by my religious tradition.

Second, the perspective reflected in these comments grows out of my own particular experience in relation to the Jewish tradition. Specifically, my involvement in Jewish traditional life and thought dates not from childhood, but from considerably later in life, and it has proceeded through slow and somewhat painstaking study over the last few decades. Therefore, my interest in ADR was first of all the product of my experiences in secular study and work, beginning in law school, and then in practice, teaching, and scholarship. Only later, after that secular experience was already in place, did my knowledge of the Jewish tradition begin to grow. As it did, my perspective on mediation and ADR was confirmed, reinforced, and refined by the insights of that tradition. Thus, the comments I offer here are the product of a gradual growth in knowledge of Jewish tradition that has been powerfully supportive of my original, intuitive attraction to and interest in ADR and mediation.

One of my first discoveries, made when I was already teaching ADR but just beginning to study traditional Jewish sources, was a section from the *Mishna*—which is the core of the *Talmud*, the primary source document of traditional rabbinic Judaism. At certain times of the year, it is customary to study a section of the *Mishna* called *Pirke Avot*—the *Sayings of the Sages*. In its talmudic context, *Pirke Avot* forms the conclusion of the laws of judicial procedure, and is essentially a code of ethics for rabbinical court judges. However, it is traditionally understood as a set of important ethical principles relevant to everyone.

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Like all of the *Mishna*, *Pirke Avot* takes the form of teachings attributed to sages of the Jewish tradition. On one particular occasion, while reading through the *Sayings of the Sages*, I stopped in my tracks upon reading this passage:

Rabbi Yishmael [the son of Rabbi Yosay] said: [A judge] who refrains from handing down legal judgments [but instead seeks compromise between the litigants] removes from himself enmity, theft and [the responsibility for] an unnecessary oath. But a judge who aggrandizes himself by [eagerly] issuing legal decisions is a fool, wicked and arrogant.¹

The passage struck me like a flash of lightning. I thought that it was truly remarkable—an explicit preference for compromise or mediation, stated right in the *Talmud* itself! I was eager to find out more about this talmudic view of what, in modern terms, we would call mediation or ADR; although given my then level of literacy in Jewish sources, this did not promise to be an easy task.

Fortunately, there were many English translations available. Therefore, a little effort led me to a translation of a wonderful essay written by Moses Maimonides,² widely recognized as one of the greatest scholars of Jewish law ever to have lived. Among his many other works, Maimonides wrote an introduction to the *Talmud*, which comments specifically on the above statement from *Pirke Avot*.³

In explaining the principle that a judge should adopt a preference for resolving cases by compromise rather than adjudication, Maimonides writes:

[The judge] must strive in all his cases to formulate a [compromise] settlement, and if he can refrain from passing a verdict his entire life, constantly [facilitating] a fair settlement between the litigants—how wonderfully pleasant that is!⁴

1. MISHNA, *Pirkei Avot* [Ethics of our Fathers] 4:9, reprinted in, SIDDUR TEHILLAT HASHEM 222 (Nissen Mangel trans., Kehot Publication Soc'y 1978) [emendation in cited translation by original translator].

2. Moses Maimonides (1135-1204 C.E.), a physician and one of the most famous Jewish philosophers and eminent rabbinical scholars, lived most of his life in Fostat, near Cairo, Egypt. His principal works include: MISHNA TORAH [CODE OF LAW]; MOREH NEVUCHIM [GUIDE TO THE PERPLEXED] (philosophical work); PERUSH HAMISHNAYOT [COMMENTARY ON THE MISHNA]; see JOSEPH TELUSHKIN, JEWISH LITERACY (1991), <http://www.us-israel.org/jsource/biography/Maimonides.html>.

3. MAIMONIDES, MAIMONIDES' INTRODUCTION TO THE TALMUD, 122-23 (Zvi Lampel trans., Judaica Press 1975) [bracketed text inserted by the author for clarity].

4. *Id.*

In the final phrase, Maimonides alludes to a popular verse from *Psalms*: “[B]ehold how good and how pleasant it is for brothers to dwell together in unity.”⁵ Quoting this verse is his way of emphasizing the great virtue of bringing about compromise. Drawing upon his personal background as not only a judge and legal scholar, but also an expert physician, Maimonides then explains the principle in greater detail:

In short, the judge must be like an expert physician, who attempts a cure first through food, and not medicine, as long as he can. Only if he sees the sickness intensifying, the food failing to cure the patient, will he prescribe medicines, but gentle ones, bearing resemblance to food Only if he still sees the patient worsen, and that these means do not subdue and overcome his sickness, will he then resort to curing him with strong drugs . . . and bitter . . . medicines.⁶

As I read this, the analogy struck me as fascinating, especially considering the connections some of us see today between ADR and related developments in law and other fields, such as “alternative medicine” and “holistic lawyering.” Maimonides made the connection several hundred years ago. His comment concludes:

Likewise, the judge must strive to effect a [compromise] settlement. If he cannot, then he should judge between the two litigants, but in a pleasant manner [still hoping to encourage them to compromise]. Only if he is unable to do so because of the stubbornness of one of the litigants who will stop at nothing in order to prevail, then he must become more firm [and decide the case according to the strict law].⁷

So, from this commentary, I learned some of the reasoning behind the ethical principle that a good judge is one who fosters compromise between the parties. However, as I continued to explore

5. *Psalms* 133:1.

6. MAIMONIDES, *supra* note 3, at 123.

7. *Id.* [Bracketed text inserted by the author for clarity]. There is no implication here that every party who refuses to accept a compromise is wrong for doing so. For example, if one party victimizes another in a clear injustice, and then offers a “compromise” that would simply continue the injustice, it is the victimizer who is “stopping at nothing to prevail,” and the victim would certainly be justified in demanding the protection of the law. Nor will the court require such a party to compromise. *Infra* note 12 and accompanying text. In general, Judaism’s concern for social justice is by no means abandoned in the preference for compromise. Rather, both are seen as serving the larger ethical and moral principle of encouraging parties to “love your fellow as yourself,” in different ways. *Infra* text accompanying notes 23-28; see also Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989).

the subject, I discovered that the preference for compromise is more than simply an ethical principle in Jewish tradition. It is actually a legal obligation on a judge in a traditional rabbinical court. In fact, Maimonides himself includes it as one of the rules for rabbinical court judges in his famous *Code* of Jewish law.⁸ Here is the section of Maimonides' *Code* addressing the subject, freely translated:

It is a positive legal obligation for the judge to say to the parties at the beginning [of every civil case], "Do you really want to litigate this case or wouldn't you prefer to work out a *pshora* [compromise]?"⁹

As the syntax implies, and as the commentaries on this rule make clear, the obligation of the judge is not just to ask the parties whether they want to proceed by way of compromise or litigation. A judge is also obliged to try to persuade the parties that compromise is preferable.¹⁰ To quote one of the commentaries, "The judge must explain to the parties that compromise will be more satisfying for them . . . and must speak heart to heart with them so that they will agree to compromise . . . because it is desirable for one to make a compromise."¹¹ The commentaries also clarify that the process of compromise is indeed a form of ADR. Specifically,

8. MAIMONIDES, MISHNA TORAH [CODE OF LAW], *Sefer Shoetim* [Book of Judges], *Laws of Courts* 22:4, at 121 (Mordechai Rabinowitz et al. eds., Mossad Harav Kook 1976) [hereinafter RAMBAM L'AM] [translation by author].

9. *Id.* In this instance, as noted in the text, the translation is not strictly literal, but conveys the accepted meaning of the rule as explained by the commentaries on it. See also, YOSEF KARO, SHULCHAN ARUCH [CODE OF LAW], *Choshen Mishpat* [Civil Law], *Laws of Judges* 12:2. The term *pshora* is sometimes translated as "arbitration," possibly because the codes themselves use another term, *bisua*, as a synonym. The commentaries make clear, however, that *pshora* is more properly understood as a form of mediation, both in talmudic and in modern usage. Arbitration also plays a role in rabbinical court procedure, but a very different one based on very different reasons. Compare Menachem Elon, *Compromise*, in *PRINCIPLES OF JEWISH LAW* 570 (1975), with Menachem Elon, *Arbitration*, in *PRINCIPLES OF JEWISH LAW*, *supra*, at 565. See generally MAIMONIDES, MISHNA TORAH, BOOK OF JUDGES (Abraham M. Hershman trans., Yale University Press 1949), for another English translated source of Maimonides' *Mishnah Torah*.

10. See E. SCHOCHETMAN, SEDER HADIN [PROCEDURE OF JUDGMENT] 210 ("It appears that the more common view of the authorities is that the court must try to . . . persuade the parties to accept the suggestion to use compromise.") [translation by author].

11. YEHOSHUA VAULK, MEIRAS AINAYIM [ENLIGHTENING THE EYES], *on Choshen Mishpat*, [Civil Law], *Laws of Judges* 12:2 n.6 [translation by author].

it is a voluntary, court-sponsored mediation process, with the judge himself taking the role of mediator between the parties.¹²

At this point, an obvious question would be: Why does Jewish law hold that a mediated compromise between two parties is better than a court-imposed judgment? Why would that be true, especially in a tradition where application of law, one would think, is considered a lofty if not a supreme value? As if anticipating the question, Maimonides explains this right in the *Code* itself, following the above statement of the judge's obligation.

He begins his explanation with words that echo his earlier-quoted commentary on *Pirke Avot*, and then immediately gives the scriptural basis for the legal rule:

The court that always succeeds in effectuating compromise between the litigants is praiseworthy, and regarding this it is said, "the judgment of peace shall you judge in your gates." (Zechariah 8:16)¹³

Clarifying the scriptural reference, Maimonides explains what is meant by "the judgment of peace." "What kind of judgment is accompanied by peace? The answer is: compromise."¹⁴

The commentaries explain the logic behind the answer: adjudication gives judgment, but it does not lead to peace because it produces a winner and loser, and the loser is unlikely to be appeased or reconciled with the winner.¹⁵ By contrast, when a mediated compromise is achieved, both parties are to some extent satisfied, both parties accept the situation and each other better, and there-

12. A *pshora*, or compromise, is defined as a process in which "an agreement is reached by concessions on all sides. . . . The difference between judgment and compromise is that in a judgment one side wins and the other loses, while in compromise, the 'winner' does not take all and the 'loser' does not give all. . . . [In this process t]he judges are the ones who mediate the concessions." RAMBAM L'AM, *supra*, note 9, *Laws of Courts* 22:4, at 121-22 n.16-17. Though the court is obligated to try to persuade the parties to use the compromise (mediation) process, see *supra* notes 10-11 and accompanying text, the court cannot require parties to do so. See SCHOCHETMAN, *supra* note 10, at 213 ("In Jewish law the general principle is that compromise requires the voluntary agreement of the parties.").

13. RAMBAM L'AM, *supra* note 9, *Laws of Courts* 22:4, at 122.

14. *Id.* The *Talmud*, whose question and answer Maimonides paraphrases, puts it even more strongly: "Surely where there is strict justice there is no peace, and where there is peace there is no strict justice!" TALMUD BAVLI, *Sanhedrin* 6b (Soncino Press, London).

15. RAMBAM L'AM, *supra* note 9, *Laws of Courts* 22:4, at 122 n.18 ("The loser leaves angry and without accepting the result."); see also SCHOCHETMAN, *supra* note 10, at 208 (citing SHMUEL ELIEZER EDELS [MAHARSHA], COMMENTARY ON THE TALMUD, *Sanhedrin* 6b ("A compromise brings the agreement and acceptance of both sides, by contrast to an adjudicated result, where the loser never gives up, in his mind, his claim against the other side, even after the court has ruled in that side's favor.")).

fore enmity is reduced and connection is, to some extent at least, restored. In this way, compromise constitutes "the judgment of peace."¹⁶

Maimonides then adds another scriptural basis for the preference for compromise: "[A]nd thus it says regarding [King] David [when he sat as a judge, as kings then did], 'David did judgment and charity for all his people.' (2 Samuel 8:15)"¹⁷ Again, Maimonides clarifies the meaning of the verse, since judgment and charity don't normally go hand in hand: "What kind of judgment is accompanied by charity? The answer is: compromise."¹⁸ Here, too, the commentaries explain the logic of the question and answer: adjudication does not involve charity, in any sense. The process does not involve anyone's giving more than they must, or accepting less than they deserve. Rather, parties get (and give) their just desserts—their rights and obligations, no more and no less.¹⁹

By contrast, in making a compromise, parties do more than they really are required to do; they accept less than they are entitled to, or give more than they are obligated to give. That is the very nature of a compromise. In compromise, in other words, parties go beyond the letter of the law, beyond what is strictly required, beyond the call of duty—and that is the very essence of the virtue called charity.²⁰ Therefore, when a compromise is mediated and

16. See Joseph B. Soloveitchik, *The Role of the Judge*, in SHIUREI HARAV: A CONSPECTUS OF THE PUBLIC LECTURES OF RABBI JOSEPH B. SOLOVEITCHIK 81, 82 (Joseph Epstein ed., 1974) ("As a result of one victor and one loser, hatred deepens, animosity is intensified . . . [Compromise] brings peace by getting the litigants to retreat . . . and see that neither was totally right nor wrong. . . . Peace and friendship are restored.").

17. RAMBAM L'AM, *supra* note 9, *Laws of Courts* 22:4, at 122. The term "charity" is the translation of the Hebrew word *tzedaka*, which is translated as both "charity" and "righteousness." According to the commentaries, and to the *Talmud* itself, it appears that "charity" is the more appropriate translation here. See TALMUD BAVLI, *Sanhedrin* 6b; *infra* notes 20-21 and accompanying text.

18. RAMBAM L'AM, *supra* note 9, *Laws of Courts* 22:4 at 122.

19. See Soloveitchik, *supra* note 16, at 82 ("Matters of litigation are resolved by victory for one and defeat for another. Victory and loss are total.").

20. See RAMBAM L'AM, *supra* note 9, *Laws of Courts* 22:4, at 121 n.20-21 ("The implied meaning [of 'judgment and charity'] is disregarding one's legal claims and going beyond the requirement of the law. . . . *Pshora* is like apportioning the claim, as described above [i.e., so that each side either gets less than it deserves or gives more than it owes]."); see also Soloveitchik, *supra* note 16, at 82 ("Judaism knows of a charitable justice A human being can never be completely right because he is finite But if he can't be unreservedly right, he can also never be completely wrong. The two litigants . . . are both right and wrong. Therefore Judaism tries to protect against total defeat [In *pshora*,] both participants give up something. This is a judgment that is righteous [and charitable].").

confirmed by the court, there is judgment and charity at the same time.

So in my initial explorations of traditional Jewish sources, both ethical and legal, I found that both place the highest value, not on the application of law to resolve conflict, but on the achievement of compromise through a form of "judicial mediation."²¹ This discovery was gratifying as a source of support for my longstanding interest in mediation and ADR,²² but it also was surprising and puzzling. I had always assumed the Jewish tradition elevated the concept of law to the highest level. Now I found that mediation and compromise actually were preferred to adjudication on the basis of law. It took some further study to assimilate and understand more fully the essential moral insight implicit in this principle from the tradition.

In fact, the explanations offered by Maimonides and the rabbinic commentaries, taken together, pointed the way to this deeper insight. The scriptural references and rabbinic explanations of "judgment of peace" and "judgment and charity" imply that, in Jewish tradition, the process of compromise reflects and embodies two fundamental values: the value of *shalom*, peace or reconciliation; and the value of *tzekada*, charity, in the sense of going beyond one's strict obligations to others. However, traditional teachings suggest that both of these values embody a still higher principle: whether in striving for peace or in acting charitably toward others, the common element is that the person, while still aware of individual self and needs, lets go of the self for a moment, sets the self aside as it were, and acknowledges and reaches out toward the other fellow.

It is this self-conscious transcendence of self and reaching toward other that is seen as the essence of both peace and charity, at least

21. See Soloveitchik, *supra* note 16, at 82 ("[C]ompromise is the ideal legal solution, not strict adherence to legality."). It is important to note that the significance of this view is that the law itself, in Jewish tradition, incorporates recognition of the value of *disregarding* one's legal rights or *going beyond* one's legal obligations.

22. This is not to suggest that I favor adoption, in our secular legal system, of the practice of judicial mediation. For a variety of reasons beyond the scope of this article, I do not believe that would be a good policy. Nevertheless, my interest in the use of mediation to address conflict, within and beyond the legal system, has long been based on values that find support in the Jewish tradition's view of the ethical and moral significance of compromise. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994). As noted at the outset of this essay, the insights I have gained through study of the tradition have supported and refined my understanding of the value of mediation, although my views originated from secular practice and study.

in the Jewish tradition, and I suspect within all of our great ethical traditions; it is also the essence of mediation and compromise.

This, then, is the value that the Jewish tradition sees in compromise. To express it formally, the value is self-conscious, self-aware, self-transcendence. In more colloquial terms, the value lies in finding a way to stand up for oneself while simultaneously making room for the other. Precisely because the Jewish tradition places such great value on fostering this kind of relation between people as fellow human beings, it places value on and encourages processes of compromise and mediation.²³

Having reached a deeper understanding of the basis of the preference for compromise, I began to see how this principle of conflict intervention is connected to fundamental themes running throughout the great ethical teachings of Judaism. For example, the book of *Leviticus*²⁴ proclaims the famous injunction, "Love your fellow as yourself."²⁵ And the traditional commentary on this verse notes that Rabbi Akiva,²⁶ one of the great sages of the *Talmud*, said, "This is the fundamental principle of the Torah."²⁷ The all-encompassing principle of moral conduct is to love your fellow as yourself. What is implied in this principle? The point is that you have to do both. It is natural and understandable to care about yourself, and, in fact, a person must have healthy self-respect. But it is not enough to consider and respect yourself only. The fulfillment of the moral imperative is to love your fellow as yourself, to recognize and integrate consideration for both self and other equally. That is the challenge—the moral challenge, the religious challenge—not only in responding to conflict but in all realms of human interaction.

To come full circle, back to the first of the traditional sources I discovered, there is another very well-known passage in *Pirke Avot*

23. See *supra* note 21; see also Soloveitchik, *supra* note 16, at 82 ("In compromise, the litigants see that neither was totally right nor wrong. This is not merely a judicial decision—it is enlightenment.")

24. The *Torah* consists of the Five Books of Moses. The third book is *Leviticus*.

25. *Leviticus* 19:18.

26. Rabbi Akiva (50-135 C.E.) was one of Judaism's greatest scholars. He grew up a poor, semi-literate shepherd, but at the age of forty he began a sincere study of the law and had a decisive influence on its development of the Jewish oral law. Many talmudic scholars trace their learning from Rabbi Akiva. *Rabbi Akiva*, at <http://www.us-israel.org/jsource/biography/akiba.html>.

27. TANACH (TORAH/PROPHETS/WRITINGS): THE TWENTY-FOUR BOOKS OF THE BIBLE 279 (Stone Edition, Mesorah Publications 1998). This is the commentary of Rabbi Shlomo Yitzchaki, or "Rashi," the most widely accepted commentator on the biblical text.

that reflects the same ethical principle—integration of concern for self and other, self-conscious self-transcendence. It might serve almost as a motto, a slogan, for those supportive of processes like mediation:

[Rabbi Hillel] used to say:

If I am not for myself, who is for me?

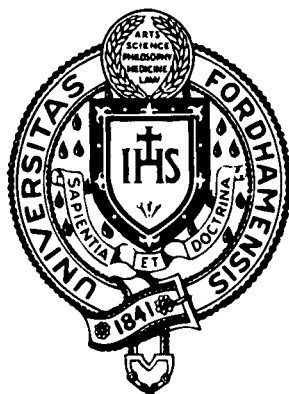
And if I am only for myself, what am I?

And if not now, when?²⁸

As Hillel's teaching suggests, it is certainly proper to stand up for oneself, in conflict and in general. It is not only proper, but necessary. But, as the teaching continues, there also has to be the movement outwards, the acknowledgment and reaching out toward the other. Otherwise, as Hillel eloquently puts it, even if I have succeeded in standing up for myself, *what* am I? I have gone only half way toward fulfilling the moral imperative of considering both self and other, loving other as much as self, achieving a full-fledged humanity. And as the *Mishna* concludes, if not now, *when*? What are we waiting for? Of course it is hard to achieve this kind of self-conscious self-transcendence under any circumstances, and especially in the midst of conflict. But Hillel's saying encourages us to meet the challenge head-on, without shying away from it or seeing it as too difficult. Read as a whole, the teaching is that standing up for self, while simultaneously making room for other, is not only possible but necessary to being fully human. Therefore, a process that encourages and supports people in doing so, like mediation, is considered uniquely valuable in the Jewish tradition.

I have continued to discover a wealth of insights in traditional Jewish sources that enrich my understanding of conflict and mediation. It has been a privilege to share some of them.

28. MISHNA, *Pirke Avot* 1:14, *supra* note 1, at 213.



CREATING SACRED SPACE: TOWARD A SECOND-GENERATION DISPUTE RESOLUTION PRACTICE

*Sara Cobb**

There have been times, during the course of a mediation, or a facilitation, when I have had the impression that something happens in the room, something that is more important than the agreement that is emerging, that the conflict is itself just a vehicle for the creation of something sacred, something whole, something holy. This experience of mine often coincides with confessions on the part of the disputants and a quality of sharing that exceeds the technical boundaries of problem-solving processes; apologies are offered, personal stories exchanged, even pictures of children, grandchildren, and vacation homes appear. It is as though the process of conflict resolution cannot contain the often spontaneous and reciprocal expressions of relief and renewed hope that emerge not only as a result of the agreement, but also in the course of its construction. Interaction patterns shift¹ and people express wonder and curiosity about the source of these changes in their sense of the "Other," as well as their experience of themselves, and about their sense of a new morality (or their return to a very old morality) that permits the existence of the Other without compromising deeply held values. Alternative dispute resolution ("ADR") is, in these instances, more than the sum of its parts, and

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1. Although there may be a statistically significant relationship between the presence of an agreement and shifts in the way parties relate to each other as the session ends, there is no research that documents a causal relationship. Furthermore, anecdotally, I have witnessed sessions in which agreements were reached without accompanying shifts in interaction patterns. Follow-up data on some of these cases show that the agreements hold, despite the absence of shifts in interaction at the time of the agreement. So agreements may be effective without the presence of any shifts in the quality of the relationship between parties. This would support the notion that conflict resolution is not coterminous with repair of ruptures in the social bond. For a discussion of the process of rupture and repair in social bonds, see Suzanne Retzinger & Thomas Scheff, *Emotion, Alienation, and Narratives: Resolving Intractable Conflict*, 18 *MEDIATION Q.* 71 (2000).

the resulting mystery remains inexplicable within the vocabulary of ADR.²

Although the field of conflict resolution acknowledges that agreements can alter the nature of interaction between disputants, it constructs this shift as a function of the agreement, as a result or an outcome of the process. Practitioners use this shift in interaction as evidence of: (1) the presence of respect or recognition on the part of one party for the other;³ (2) the viability of long-term improvements of relationships between parties;⁴ and (3) even as evidence that parties will be able to transfer the experience (skills) of the conflict resolution process to other conflicts.⁵ Thus the benefits of altered interactions are instrumentally construed—relationships are improved, the agreement will be more durable, and parties will be more able to apply the experience of one positive conflict resolution process to another conflict, by themselves, in their future. Although these benefits may well appear, as a result of the structure and process within mediation, they do not describe either the experience of the relational space or the emergence of morality itself.

Beyond these instrumental accounts, there lurks the presence of a relational process that defies our explanations as practitioners. Even further, attempts to define or describe these processes in non-instrumental terms, as communion (rather than the convening of stakeholders), as a process of witnessing (rather than listening),

2. See generally Albie M. Davis, *The Logic Behind the Magic of Mediation*, 5 NEGOTIATION J. 17 (1989). Davis endeavors to account for the “magic” of the mediation process. I am not at all suggesting in this essay that “magic” happens. On the contrary, I am hoping to show that what we take as “magic” is, in fact, a set of technical practices that yields shifts in interactional patterns.

3. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 2-3 (1994) (discussing the role of recognition in the mediation process). However, Bush and Folger do not construct this as a dynamic or systemic process, but as an intrapsychic process within an individual.

4. Judith E. Innes, *Evaluating Consensus Building*, in *THE CONSENSUS BUILDING HANDBOOK* 631 (Lawrence Susskind et al. eds., 1999) (discussing the methodological problems related to outcome research in consensus building processes); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RESEARCH* 9 (Kenneth Kressel et al. eds., 1989) (reviewing research on divorce mediation). Even though these studies are ten years apart, the problems related to longitudinal research remain.

5. Jeffrey Loewenstein & Leigh Thompson, *The Challenge of Learning*, 16 NEGOTIATION J. 399, 406 (2000) (describing the role of analogy in learning). Loewenstein and Thompson argue that the transfer of skills requires the development of comparisons through analogy. *Id.* This research would suggest that the mediation process alone would not be instrumental in the development of the ability to transfer skill sets from the session to other conflicts.

as a process of giving testimony (rather than stating interests), and as the creation of a covenant (rather than an agreement), constitute a serious transgression, blurring ADR's secular language with a language from religion(s), defying the boundary between church/synagogue/mosque/temple and state. The tenacity of ADR's secular discourse grows out of the strength of our collective fear of blurring this boundary.

This secular discourse is itself what Foucault has called a "regime of discourse,"⁶ completely consonant and resonant with the state; "neutrality," rather than morality is celebrated; "turntaking," rather than reframing, is the vehicle for ensuring "equal participation"; and "consensus," rather than understanding, is the objective. ADR has adopted, in a rather wholesale fashion, the discourse of the (democratic) state, a discourse of decision-making, not by majority rule, but via consensus building. This discourse struggles to erase its own moral commitments—equality, participation, voice, and personal responsibility—precisely so that it can position itself within value-based disputes, as an alternative, "neutral," frame. This is possible because these moral values are so pervasive within our democratic culture that we do not notice them as moral commitments; we do not notice them as a frame for containing moral discussions that is itself a moral framework.⁷

Furthermore, this secular discourse transforms any discussion of morality into a pragmatic discussion of needs and interests. The coincidence of the pragmatist view of conflict as based on competing needs and interests maps completely onto the discourse of the state; our secular state is founded on the notion that there will be a diversity of views, and that there is no Archimedean moral frame from which to judge, other than the values of the state itself, expressed in the U.S. Constitution (equality, voice, participation) as these are seen as values that ensure the possibility of diverse values. However, even though these may well be "meta-values" in that they function to permit other values to flourish, they are still values and retain their privilege as frames for negotiating moral

6. Michel Foucault, *Politics and the Study of Discourse*, in *THE FOUCAULT EFFECT* 53 (Graham Burchell et al. eds., 1991).

7. Although there is some acknowledgement within alternative dispute resolution ("ADR") that disputes are moral contests between competing moral frames, there is very little research on how morality is negotiated. See ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 3-4, 8-10 (1988) (stating that there is no longer a unified or stable frame from which to assess morality, once we grant that there are multiple realities, each with its own form of rationality and justice).

discussions. As the values of the secular discourse mask themselves, morality itself is expunged from our ADR discourse—the moral frames of ADR itself are enveloped by the discourse of the state; and the moral frames of parties are disguised as “needs” and “interests,” rather than described explicitly as moral commitments. So relative to both the content of the process, as well as accounts about the process (in training manuals, theory, and research), the process and experience of moral discussion is effaced in our ADR practice.

Clearly there is a “regime of discourse” in ADR that systematically eludes discussion of the functional accounts of relational space and moral discussion. Experience is flattened into “satisfaction” with outcomes, the moral frameworks that emerge as the infrastructure of this relational space are either effaced by a discourse of “neutrality” or collapsed into a discourse of “participation.” What we know about ADR is a function of the vocabulary that is harnessed to describe and prescribe its practices. Since prescriptions for practice carry, like a DNA code, moral frameworks for evaluating practice, the discourse that houses our prescriptions for practice determines what moral frameworks we use to evaluate practice, as well as to train others. An examination of this regime of discourse reveals how the moral frameworks of ADR, buried in our prescriptions for practice, paradoxically disable attention to the pragmatics of moral discussion. Given that we cannot understand what we cannot name, I shall attempt to provide a new vocabulary for describing the pragmatics of moral discussion, as well as a prescription for ADR practice that reinstates moral discussion as central to conflict resolution processes.

MORAL DISCUSSION AS (SACRED) NARRATIVE PRACTICE

Morality is not a set of abstract decontextualized rules collected into a set of prescriptions for behavior; it is a story about a set of events, characters, and themes that exemplifies what to do and what not to do, carried within embedded metaphors that make sense of the world (e.g., “She acts like a princess . . .”) and materialized in a narrative form. In ADR processes, moral discussion involves the negotiation of the past that builds toward instructions for the present and the future. Parties in conflict are captured by the stories they tell about the problem, its antecedent, and the roles played, and there is always a moral to their story, a theme that usually reconfirms, as do all the other parts of the story, their description of the problem. Inevitably, the “moral of the story” is

that the Other has to change in some way, as well as offer restitution.⁸ As a narrative operates as a system, its entire component parts function in an interrelated fashion to maintain the integrity of the meaning of the whole narrative. Likewise, any change to a portion of the narrative, i.e., roles, plot line, or themes, shifts the meaning of the whole narrative. Moral discussion, from this perspective, is often simply the reiteration by each party of their story, as they elaborate plot lines, values, or character roles that reconfirm and anchor the “moral of the story.” In order to generate shifts in the moral of the story, there must be some evolution of the story content of both parties. Seen from this perspective, productive moral discussion is not simply talking about values, it is the process of evolving the content of narratives so that there is a shift in the moral corollaries associated with a story.

Consider the following case: I was asked to mediate a dispute within a partnership of a small accounting firm. The three partners included two young women, Beth and Anne, brought up through the ranks by the man, Steve, who initiated the firm. Steve was convinced that one of his partners (Beth) was behaving destructively and fomenting coalitions against him within the firm. He asked for a mediation to develop an agreement about how they would work through their differences, as she had repeatedly had “tantrums” on occasions when he tried to air his views.

Beth agreed to the mediation, eager to have a forum in which she could air a host of complaints against Steve. She routinely felt he ignored her input; Beth also felt that the other partner, Anne, functioned too much like Steve’s (favored) daughter, never standing up to him, which put all the responsibility for contestation (airing differences) on her. Anne indicated, in an initial interview,⁹

8. In a set of approximately thirty mediation sessions, videotaped and audiotaped for research, Janet Rifkin and I found that it was not at all uncommon for disputants to recommend to the mediator—often during a caucus—that the Other should go see a therapist. This was not a systematic research finding, but more an incidental one. We never did any systematic research on this issue. There was a need expressed for the Other to change, as well as to repay for some damage that was done. Furthermore, in some cases, parties made this recommendation for the Other to go to therapy independent of whether or not there was an agreement reached.

9. Based on the discourse analytic research that Janet Rifkin and I conducted on mediation sessions, we found that the first party to speak “colonizes” the discursive terrain, making it difficult for the second party to do other than defend themselves. Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35, 53 (1991) (discussing this colonizing process). Therefore, I often conduct separate initial interviews when I am concerned over the volatility or the marginality of one or more of the parties. In this case, I was concerned about both, so I met with the parties separately.

that she was concerned about Beth's "hot temper" and felt sorry for Steve, even though she often agreed with Beth that Steve functioned, all too frequently, in an authoritarian fashion.

At the opening of the public session, I asked Steve to choose an instance that he felt exemplified the problematic interaction with Beth. Steve told of a time when Beth stormed into his office, shouting about a set of bookcases that were in the process of being built in the corridor, outside the staff kitchen area. He described his shock and dismay over her behavior and his distress that the staff knew they were in conflict, which he felt diminished his authority in the firm and feared could lead to triangulations between staff and partners.

Like most stories that appear at the opening of ADR processes, Steve's story is a victim story, carefully constructed so as to position Beth as morally inappropriate and, no doubt, he has practiced this story with others, perhaps his wife, perhaps other family members and close friends. Victim stories are public—they do not become relevant unless and until they are witnessed by others. Girard has described this process of witnessing victimization, noting that victims call for witnesses.¹⁰ He describes victim stories as sacred processes through which community, morality, and law itself are born as people gather together, formed through collective inquiry, to make sense of what happened to the victim.¹¹ He argues that victimization is essential to the birth of law and community which can only materialize as people work collectively, in some public realm, to assign causality and develop moral corollaries as a way to redress "the body of the victim."¹²

10. RENÉ GIRARD, *VIOLENCE AND THE SACRED* 79-80, 258-67 (Patrick Gregory trans., Johns Hopkins Univ. Press 1977) (1972). I am not suggesting that all victims want their pain witnessed; on the contrary, many victims adopt the story of their victimizer and struggle to hide their pain. This is not to be confused with the social construction of victims, as the objects of weapons and the locations of wounds. See ELAINE SCARRY, *THE BODY IN PAIN* (1985) (discussing how pain is storied, and in the process, victims and weapons, if not victimizers, emerge).

11. GIRARD, *supra* note 10, at 79-80, 258-67.

12. *Id.* The "body of the victim" is a phrase used by ANDREW J. MCKENNA in his book, *VIOLENCE AND DIFFERENCE* (1992); it invokes the visual imagery of the victim's body because speakers locate wounds (emotional and physical) on a specific person who is harmed. Thus "the body" is a site for making the victim present to others. It also makes obvious that the body is often in some way presented as marked by victimization, so the body of the victim becomes the record that victimization occurred.

Examining mediation (or ADR) as a process of “tracing the victim”¹³ provides a window into the *sacred* process through which community and morality emerge. However, because conflict stories are morality tales, the repetition of morality tales by either party does not constitute the creation of community; community requires the creation of some consensus about “the body of the victim.” Paradoxically, “the body of the victim” disappears as a new story (about who did what to whom and why) emerges, as this case study will demonstrate.¹⁴

Steve describes himself as helpless either to predict or affect Beth’s “emotional storms” which “toss him about,” and he feels “capsized.” Steve links events together in a way that construes Beth as irrational and in such a fashion that the consequences of her action could well bring about the demise of the firm that he worked so hard to build. The morality that emerges is one that heralds Steve’s sacrifice and hard work over the years, his rationality, and the overall goal of coherent leadership of the firm, toward not only its profitability, but also the maintenance of the sense of “family” that helps foster trust and good relations across staff and between staff and partners. This opening permitted Steve to elaborate his position as victim, as well as the moral frames that function as the platform for his legitimacy and Beth’s delegitimacy (she had not made similar sacrifices—in fact many “goodies” had come easy for her—she was not rational, and she cared little for the long-term viability of the firm, much less the “family” environment).

Like almost all disputants in mediation, Steve externalizes responsibility, locating the cause of the problem in Beth’s action. As a plot line, Steve’s victim story is linear (Beth causes the action sequence) rather than circular (they interact together in a way that brings about the action sequence). Second, in Steve’s story there is no account of variation in Beth’s (negative) character—the story is intended to exemplify the problem, and within this story, there is no account of how Beth does things that exemplify traits other than those attributed here in the victim story (for example, “thoughtfulness” or “hardworking”). Beth is portrayed in this victim story as a very flat character with little variation in her behavior or complexity in her character. Third, the values are portrayed as a very po-

13. McKenna describes Girard’s work in a book that contains a section entitled, “Tracing the Victim.” ANDREW J. MCKENNA, *VIOLENCE AND DIFFERENCE* 69-82 (1992).

14. The following case study is from a mediation session in southern California (1995) (transcript on file with author). “Steve” and “Beth” are pseudonyms.

larized (and polarizing) framework—Steve is advancing a moral framework (totally consistent with the framework of mediation itself) that valorizes “respect” for others, exemplified by listening, rather than flying off the handle, and “trust,” rather than malicious gossiping behind his back. Across all three dimensions of the narrative (plot, character roles, and values/themes), Steve’s victim story offers a “morality” in which there is little or no account of how his actions may have prompted Beth’s response, i.e., there is no interdependence; Steve delegitimizes not only how Beth behaves, but also who she is as a person.

Through the telling and elaboration of Steve’s victim story, Beth sighed, changed position in her chair, shook her head, muttered, and made exclamations (“That is ridiculous!”). I persisted in my efforts to witness Steve’s pain, and elaborate his moral perspective, asking Beth to monitor her upset feelings and if she got to a six (on a one to ten scale) she should just leave the room, and I would call her in when Steve was finished. However, I also told her that I was sure that she would learn things she did not know, if she stayed, and that she might need the subtlety of this information to “tell her story.” She stayed put.

Before she told her story, from her perspective, I asked her to help me elaborate Steve’s perspective:

SARA: I am sure it has been hard to sit and listen

BETH: Yes, it has, especially since

SARA: Wait a minute, before you start with your view, I want to let Steve know that the problem is not one of not understanding—that you fully “understand” his viewpoint . . . so I will ask you a couple of questions that help him see that you are competent in his worldview Can you imagine with me, who, on the staff, you think he has been most concerned would be vulnerable to this conflict between you and Steve?

BETH: Who I think he thinks

SARA: Yes.

BETH: Ummmmm, It would have to be Susan. She is a new and very promising accountant on staff. He really wanted to bring her on and thinks she is partner material eventually, and he will be worried that this conflict, which is very visible, would scare her away.

SARA: Do you share his view that Susan is worthy of support—that she may indeed be partner material?¹⁵

15. This question was a strategic mistake on my part, as Beth had not yet been witnessed, and, predictably, would use any opportunity to delegitimize Steve and elaborate her perspective. So although the first question allowed her to demonstrate

BETH: Well, of course I am worried that she may not be able to stand up to him, but part of the support that I want to give her is to help her find her voice with him, so she knows that this is a place where her views count.¹⁶

SARA: OK. A second question, before you tell your story . . . If I were to ask Steve what he has done to try to reduce the tension, what would he tell me?

BETH: I think he would say that he tries to avoid me, that he tries to avoid conflict, and that he has gone so far as to cut down the frequency of the meetings, just to reduce the opportunities for conflict between us. While I disagree with his method, I do see that he has tried.

SARA: OK. Thanks for being willing to show him you are able to take his perspective. Steve, I do not know if she hit the nail on the head, but I do not want to take time at this point checking in with you—she needs to be able to give her perspective at this point, so I will ask her to do that now. As I told her, if you get to a six on a scale of one to ten, just leave the room, and I will have an idea as to how you are faring. Otherwise, please try and listen, so when I ask you to take her perspective, as she did yours, you will be able to do so with some texture and precision.

OK Beth, let's hear your side of this . . .

Beth proceeded to tell a victim story about how, over time, Steve had become progressively more authoritarian, less collaborative, and even secretive. She came to the firm, in the first place, because she thought it was a place where she could grow and take on increasing responsibility for the firm, in an environment that was

competency in Steve's worldview, it would have been strategically better to end my witnessing of his view with a question asking him to demonstrate competency in her world view:

Steve, now that I think we know more of your perspective, and before Beth has her chance to speak, I would like you to signal, if you can, that you are at least a little familiar with her worldview, so I ask you this question: "Who in the firm would you think Beth would say is most at risk as a function of this conflict between the two of you?"

Answering this question requires him to put himself in her shoes before she begins to speak, reducing the "work" she has to do to elaborate her worldview. Thus, although it was useful to ask her to speak from Steve's worldview, it might have been better to ask him to do that, as he finished laying himself out as the victim. However, in neither case would it have been useful to ask either one to then agree or disagree with the other as to whether the other in fact got it "right" regarding who they were the most worried about in the firm. Yet that is exactly what I asked Beth to do, with a predictably bad result. Sharing my hindsight hopefully will help others to avoid this mistake.

16. Inadvertently, I gave her an opportunity to delegitimize Steve. This followed quite predictably from my question, which, as I mention *supra* note 15, was problematic, precisely because it opened the door to delegitimizing Steve.

“human” as opposed to cut-throat (“like firms in L.A.”). However, as her victim story notes, she has not been able to grow, as Steve has become less and less willing to share decision-making processes with her. As an example, she discussed with the staff the possibility of expanding the staff kitchen area, so that a table could be added. But before she had time to bring it to a partner meeting (which Steve regularly cancelled or postponed), Steve had installed bookcases that made the kitchen addition impossible. By her account, Steve had misrepresented himself to her and the firm, pretending to be open to others’ participation. In fact, he was unwilling to share power and information. Furthermore, he kept others “down” by pretending that the firm was his family, which made it difficult to address substantive differences that others may have had with Steve. According to Beth, he positioned himself as a “patriarch.”

Through this discussion, Steve sat quietly, at times shaking his head and making notes. When Beth was finished, I asked Steve if he was willing to show Beth that he understood her perspective, that he could walk in her shoes. He agreed to do this, so I asked him:

SARA: Has there ever been a time in your life when you felt somehow betrayed, or shut out?¹⁷

STEVE: Well, I am not sure I usually have good relations with others

SARA: But relationships are never always perfect, so there has been some point at which

STEVE: Well, I guess the closest I had to this experience was with my older brother—he usually made unilateral decisions about things we should do, in our group of friends. I was the younger “tag-along” and although I almost always went along with him, I was sometimes either worried I would not be able to keep up, or resentful that it was not exactly what I wanted to do. So maybe that is similar

SARA: And were you ever able to alter that pattern with him? It is hard to do

STEVE: No, I was never able to change this, as he has always been my older brother.

17. I was careful to use this relational language of “betrayal” which was not Beth’s word, but reflected the familial and relational view that Steve had of the problem. Beth nodded when I asked the question, signaling her alliance with me, perhaps because I linked “betrayal” (Steve’s familial language) with “shut out” (Beth’s language of “voice”).

In this exchange, I asked Steve to begin to elaborate the moral framework that Beth had advanced (being inside or shut out of decision-making), and interestingly enough, he used an example from his family as a way to illustrate his experience. On the basis of this example, combined with the complaint he had about Beth, I surmised that Steve uses familial relations as a standard for assessing his professional relations with others. This may function in a deterministic way, by restricting the roles that others can play with him, as well as what roles he can play with others. In a private conversation I had with Steve, he described his "fatherly" feelings for Beth and Anne, and expressed hurt over Beth's unreasonable behavior. He was using a father-daughter role set as a frame for morally assessing Beth's behavior.

Beth experienced this, as Steve had often admonished her as if she were a child, with a "you should know better" tagged onto complaints he made about her work. This infuriated Beth and made it much more likely that she would be, in her own words, a "rebellious daughter" at the same moment she was trying to break out of the father-daughter frame altogether. We discussed this in front of Steve, and then I asked Beth what she would need to do to really break free of the "rebellious daughter" frame.¹⁸ She indicated that she could write memos that detailed her concerns, adding them to the agenda for partner meetings. She also indicated that she would not discuss Steve with Anne or any other staff member, in an effort not to "rebel" by speaking badly about the "father." We discussed these strategies in front of Steve, as ways to help him remember that Beth was not his daughter.

In turn, I asked Steve whether he thought his role as "father" was working and he indicated that, despite his comfort with that role, it was not working. In fact, over time he wanted to "not have to be the father" because he was hoping to put more and more responsibility on other, younger partners. I asked him what he could do to break his pattern of acting like a "father" and he suggested four things:¹⁹ (1) that all partner business be discussed at

18. In a private session with me, Beth confessed that she was very frustrated with herself for acting like a "rebellious daughter," as she had long thought of herself as a very professional person.

19. These items emerged out of our interaction, so I played an important role in organizing a collective inquiry into what had worked in the past and how he could help it work in the future. Again, this kind of involvement is not, in my view, a sign of "bias" (a concept that implies that a value-free framework is possible), but rather a sign of the responsibility I take as a mediator for facilitating a quality of moral discussion that yields new plot lines, new roles, and new value sets. See Janet Rifkin et al.,

partner meetings, not in informal settings between meetings; (2) that he would take the notes at the meetings because this would require him to listen and record the input of others; (3) that each partner be assigned a functional role, so that at every meeting, each partner would be in charge of reporting about work within their domain and asking for input from other partners, yet with ultimate responsibility for the area; and finally (4) he offered to pay for a facilitator for the partner meetings for the next three months, hoping that if he got himself out of the role of convening and running the meetings, there would be less conflict and more substance to the discussion. These were very substantive suggestions that grew out of our conversation about both the content and the process of partner meetings.

Contrary to the dominant mediation ideology that mandates that mediators attend to process without impacting the content of what disputants say (about the nature of the problem or its solutions), I was very involved in the emergence of this content, shaping questions and making comments that developed the options. However, this did not mean that Steve was not involved—I interacted with him in such a way that these options and this plan emerged. I played a role, but did not originate these “solutions.” To say that these solutions were socially constructed means that they emerged from the interaction between Steve and myself and that they rested heavily upon the history of the conversation, both in the mediation and prior to the mediation. It was my intention to favor versions of “reality” that: (1) clearly established the suffering of each party; (2) created descriptions of that suffering that connected it back to their own actions, without minimizing the suffering or “blaming the victim”; (3) positively connoted the intentions of each actor, with other actors; (4) created variation in character traits; and (5) added complexity to the value sets in use, i.e., incorporating more and different values.

This is a highly engaged mode of mediation practice that recognizes that mediators participate in the social construction of meaning, regardless of what questions they ask and what they do not ask; regardless of whether they remain silent, or make summaries; regardless of whether they actively reframe, or whether they simply repeat descriptions that disputants offer. This kind of engagement on the part of the mediator requires calibration with disputants *and* careful ongoing observation of self-in-interaction.

This kind of observation is consistent with the features von Foerster attributed to second-order systems in which the process of observing the conflict system brings forth the conflict system.²⁰ In other words, the nature of the “reality” that is constructed is dependent upon the nature of the descriptions that “observers” make of the system. This implies that mediation is a second-order process in which the mediator’s interaction with others (elaborating observations) impacts the evolution of the conflict, both by the content of the conversation, as well as by the nature of the interaction in which that content emerges. This is a radical departure from what could be called “first-generation” mediation practice, where the mandate not to impact the content of the dispute is thought to be essential to preserving the privilege the parties have to define their own problems and build their own solutions. However, once we adopt an interactionist or social constructionist perspective, the mandate to separate content from process dissolves, as mediators recognize the inevitability of their impact on the content of the dispute. This attention to the evolution of the content calls for a “second-generation” mediation practice in which mediators interact with disputants so as to evolve the conflict stories, reformulate relationships, reframe the past, and rebuild the future. This second-generation mediation practice requires careful attention to both the nature of the morality that is advanced in the session, as well as the process by which it is advanced.

In this session, the morality that was advanced grew out of the metaphors surrounding “father” and “rebellious daughter” roles—in our conversations, these roles were progressively defined as both inappropriate and unworkable. Once the new normative stage was set (the new moral frame created), Steve and Beth could work on the agreement. After receiving compliments for their contributions, Steve and Beth signed an agreement that stipulated all the suggestions each had made. They spent some time trying to discuss the functional distribution of responsibility within the partnership, until we realized that this was an agenda item for the next (facilitated) partner meeting.²¹ The session closed with an agreement. Follow-up interviews with Steve and Beth (at one, three, and six

20. Heinz von Foerster, *On Constructing a Reality*, in *THE INVENTED REALITY* 41 (Paul Watzlawick ed., 1984).

21. They asked me to facilitate the meeting and I declined; instead I referred Steve and Beth to other professionals in my network.

months) showed that there were still issues in the partnership,²² neither Steve nor Beth felt that Steve was trying to function as a father to Beth and neither felt that Beth was resorting to acting as a "rebellious daughter." On the contrary, they felt that the pattern between them had shifted radically and the quality of their relation had improved. Rather than attribute this to the "magic" of mediation, I prefer to try and recount how we "traced the victim," and in the process, elaborate the nature of moral discussion that distinguishes first- from second-generation mediation practice.

RETRACING MORALITY IN MEDIATION

Moral discussion in mediation often works against the very goals of the first-generation mediation process—parties "tell their story," launching moral frames that provide the basis for their own legitimacy, while delegitimizing the Other. Paradoxically, mutual blame is the outcome. From this perspective, value frames are tools that parties use to position negatively the Other in discourse.²³ As the accounting firm case study shows, there is moral discussion in mediation; however, it only serves to reconstitute problematic relationships. Moral frames emerge and are deployed as weapons to position the self as appropriate and the Other as inappropriate. Following Girard, this kind of moral discussion does little to generate either law (social rules) or community, as there is nothing "sacred" in the act of mutual blame.²⁴ On the contrary, in the process of mutual blaming in which values are weapons, both sides refute the victimization of the Other in a struggle to occupy the place of the victim. It falls to the mediator to create what Girard calls a "sacred" place by functioning as "witness" to victimization of both sides.²⁵

A "sacred" place is one, according to Girard, that does more than simply recount the victimization, in the presence of others—it

22. When I probed for the nature of the "issues," Beth explained that Steve found it difficult to be one of three partners, and not the most important partner. So he continually was "sneaking" into functional areas where he was not responsible, gathering information. Steve agreed to this description and explained it by noting that during his many years as the sole partner, he had to do it all by himself, so he was not used to working with others. Beth also used this frame, so that while they saw Steve as behaving problematically, both saw it in the context of his past experience of being the only partner, and both agreed that change was difficult.

23. B. Davies & R. Harré, *Positioning and Personhood*, in *POSITIONING THEORY: MORAL CONTEXTS OF INTENTIONAL ACTION* 32, 35-41 (Rom Harré & Luk van Lagenhove eds., 1999).

24. GIRARD, *supra* note 10, at 257-73.

25. *Id.*

elevates violation of an individual to the level of the collective, as others witness and elaborate the violation in public spaces.²⁶ What happens to one person becomes something that reasonably happens to anyone,²⁷ and thus the collective is itself at risk for similar violations. Second, in the course of this public process, there is also transformation of the victims—they become a symbol for the collective, a sign of both danger and immorality, signifying a practical breach of security, as well as a moral breach of someone's social obligation. The public story about how the violation occurred functions to increase the security of the collective if strategies to avoid future violations can be created; the public story about who contributed to the violation and why it happened generates morality tales about how people should behave toward each other. It is in this process, according to Girard, that the collective comes to witness itself as a connected whole—relationships are affirmed, social norms created and acknowledged, and social harmony restored.²⁸ Therefore, a place is "sacred" if it can create the conditions for the victim to be recognized, for the victimization to be accounted for, both practically and morally, and for social relationships to be anchored on that emergent morality. All of this involves the creation of a space where the community can witness itself as a community in which social obligations and norms materialize.

But this act of witnessing is not a passive activity;²⁹ on the contrary, this "witnessing" involves very active participation in the evolution of narrative content. For example, both Steve and Beth told stories that had very problematic features:³⁰ although each of these stories functioned to display the speaker as the victim, neither witnessed the victimization of the other. My role in the session was to enable each person to see the other as the victim, and in the process, build a new moral framework. So it is not only

26. *Id.* at 78-80, 269.

27. Accidents are not ritualized unless victims sue others for damages, in which case the telling of the violation becomes a public process in a courtroom setting.

28. GIRARD, *supra* note 10, at 78-80, 258-67.

29. I define "active listening" as a very passive activity, for it does little to evolve the content of the conversation. In fact, it continually anchors the very descriptions by which each party delegitimizes the other.

30. For a description of the "better formed" story, see Carlos E. Sluzki, *The "Better-Formed" Story: Ethics and Aesthetic Practice* (unpublished manuscript on file with author). Sluzki provides a normative framework for discriminating narratives that internalize personal responsibility and increase options, from narratives that reduce options and externalize personal responsibility. Here I am using Sluzki's normative framework for assessing the evolution of conflict stories in mediation.

that I functioned as a witness—I asked questions, created summaries, and made comments that enabled each party to witness the other *and* to witness their own role in creating the conditions of that victimization. In this case, Steve victimized Beth by treating her as a daughter (Beth's story) *and* she responded by acting in a rebellious fashion, confirming Steve's worldview, participating in her own victimization, and victimizing Steve in the process. This kind of "double witnessing" involves tracing the victim, as well as tracing the role that each plays in the victimization of the other. Double witnessing functions to create a set of doubled values—a new value system emerges that is used by each party to understand the new problem frame and there is a new set of meta-values, which celebrate personal responsibility and reciprocity. In this mediation, a common value set emerged that defined familial relationships as inappropriate frames for navigating professional settings. Treating a colleague as a daughter is unprofessional and acting like a daughter is unprofessional. At the meta level, however, the act of creating contributions toward the resolution of the conflict, functions as a performative—it enacts personal responsibility and reciprocity, materializing these values as second-order values, as a morality for talking about morality. At this moment, community is formed as new social rules emerge.³¹

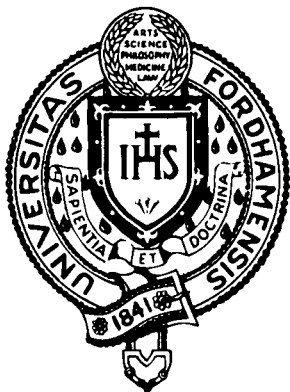
Like the great Wizard of Oz revealed behind the curtain, the "magic" of mediation is revealed—shifts in relationships, which themselves bear witness to shifts in how we see self and Other, are not mysteriously produced by the mediation process itself, but by the careful process of "double witnessing" in which both pain and accountability emerge as features of the problem, and its solution emerges via the evolution of the narratives that parties tell. By implication, double witnessing requires that mediators themselves own their participation, as witnesses who do not only reflect the pain of parties, but also actively construct it, along with its link to responsibility (the ability to respond). They must witness themselves as witnesses to others. While this definition of the role of the mediator defies the injunctions to be "neutral," it does contribute to anchor a second-order morality that celebrates taking personal responsibility for mediators' participation in, and accountability for, the nature of the community that is created in

31. I would differentiate these instances from those sessions where people simply agree to stop doing what they are doing already, as is the case with international cease-fires, for example. No new social rules are created; old social rules are simply re-invoked, usually with little success.

mediation, as well as the social norms and rules that frame that community, as a community. Mediation is thus a very moral practice, and mediators are deeply implicated in the nature of the moral worlds that emerge in sessions.

In the first-generation mediation practice, we learned that there was a formula that could be useful for resolving conflicts. We learned to bring parties to the table, to structure the process so each side had a turn to speak, and to help parties invent options, based on the elaboration of their interests. In the first-generation practice, we practitioners clung to our belief that the process alone could yield outcomes that not only resolved disputes, but also increased the humanity of those involved. We trusted “neutrality” as well as the “ground rules” of turn-taking. We worked to witness the pain of the parties and struggled not to tamper with the content of their stories, as that was thought to constitute a violation of our practice as “neutrals.” However, as I have tried to show in this essay, mediation is a moral practice at two levels: (1) it is *about* moral frameworks, and (2) it *advances a morality* of personal responsibility and accountability as a way of dealing with others. If we adopt this view, we then must let go of some of the assumptions so central to first-generation mediation practice and embrace what could be called a second-generation practice, in which we come to witness the role that we as mediators play, with parties, in the social construction of moral frames for evaluating action past, present, and future.

In this second-generation practice we are not only freed from the arbitrary constraints imposed by the secular discourse of mediation. We also are obligated to initiate ourselves into vocabularies through which we can track our role as moral practitioners. Defining ADR as a “sacred” practice does not signal its link to a particular religious tradition, but instead calls attention to the transformative capacity of the practice—through the transformation of victim stories, community is brought forth, enabling it to bear witness to itself as a community, as a set of intertwined relationships. Defining ADR as sacred practice enables us, as practitioners, to witness the moral frames we contribute to create, both in discrete sessions, as well as across our practice, over time.



COURTS, LAWYERING, AND ADR: GLIMPSES INTO THE ISLAMIC TRADITION

Walid Iqbal*

INTRODUCTION

The *Qur'ān* says, "And if two parties of the believers quarrel, make peace between them; but if one of them acts wrongfully towards the other, fight that which acts wrongfully until it returns to Allah's command; then if it returns, make peace between them with justice and act equitably."¹ Accordingly, all historical evidence relating to the Islamic legal system consistently points to the importance of *sulh*—compromise, settlement, or agreement between the parties to a dispute—invariably abetted by the court adjudicating such a dispute.

This essay focuses on *sulh*, which has its roots in an age-old Middle Eastern ritual. Under Islamic law, "[t]he purpose of *sulh* is to end conflict and hostility among believers so that they may conduct their relationships in peace and amity In Islamic law *sulh* is a form of a contract (*'akd*), legally binding on both the individual and community levels."² Although the concepts of compromise, settlement, reconciliation, and agreement—as encapsulated in *sulh*—are not alien to the contemporary Western mind, the process through which *sulh* is reached may differ in Western and Islamic systems. In the modern day West, this process typically would involve the alternative dispute resolution ("ADR") mechanism whereby regular courts are bypassed and a parallel set of institutions are called upon for assistance. In the Islamic tradition, regular courts and ADR mechanisms are essentially intertwined and, historically, the legal systems that have relied on this traditional

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1. QUR'ĀN 49:9 in THE HOLY QUR'ĀN (M.H. Shakir trans., 1983), available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=811284>.

2. M. Khadduri, *Sulh*, in THE ENCYCLOPEDIA OF ISLAM, NEW EDITION, VOL. IX, at 845-846 (Clifford Edmond Bosworth et al. eds., 1997).

model have dispensed justice much more efficiently than those departing from the Islamic spirit.

This essay first will examine the traditions of adjudication and ADR in Islamic courts as revealed by seventeenth century Ottoman practice. This will serve as a basic model for the purposes of an overall analysis. It then will review the success of the modern day Saudi legal system, which is notable for its adherence to the traditional Islamic model, and the failure of the modern day Moroccan system in its significant departure therefrom.

This essay concludes that an ADR mechanism is embedded in the Islamic concept of dispensing justice through the traditional emphasis on *sulh*, while Western-style lawyering runs counter to the workings of such mechanisms.

THE OTTOMAN MODEL³

Justice Felix Frankfurter once observed that the United States Supreme Court "is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."⁴ Justice Frankfurter's view reflects the limited Western understanding of the function of a *kadi*, an Islamic judge, as a character out of *Arabian Nights*, sitting in a mosque or under the shade of a tree and dispensing justice as he deems fit. Instead, "the *qadi*, like his colleagues elsewhere, is often called upon to give substantive content to principles that cannot be mechanically implemented" and "far from being arbitrary or unsystematic, *qadi* justice partakes of regularities that not only run through the course of Islamic legal history but also reveal the interplay of Islamic law and the societies in which it is rooted."⁵

In light of the above, and in view of the fact that the *kadi* directly or indirectly becomes the instrument through which settlement or compromise, *sulh*, is achieved, it is important to understand the status, the methods of appointment, the functions, and the processes and the procedures of the *kadi* court in the traditional seventeenth century Ottoman system.

3. An extensive study of this system has been conducted in Ronald C. Jennings, *Kadi, Court, and Legal Procedure in 17th Century Ottoman Kayseri*, 48 *STUDIA ISLAMICA* 133 (1978) [hereinafter *Kadi, Court, and Legal Procedure*], and Ronald C. Jennings, *Limitations on the Judicial Powers of the Kadi in 17th Century Ottoman Kayseri*, 50 *STUDIA ISLAMICA* 151 (1979) [hereinafter *Limitations*].

4. *Terminiello v. Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting).

5. LAWRENCE ROSEN, *THE JUSTICE OF ISLAM* 3 (2000).

The Ottoman family stands out among many ruling dynasties because it honored the Islamic law tradition that grants special status to the office of the *kadi*: although other officials depended solely upon the sultan, or central ruler, for the source of their power, the *kadi* could claim greater authority—divine, in addition to imperial—to enforce law within his domain.⁶ Under the Ottoman system, every citizen had an inviolable right to the due process of law and to a hearing in open court before an impartial judge.⁷ Every citizen also was vested with certain basic rights—as rights ordained by God—and no official could strip the citizen of these rights except in accordance with God's law.⁸

Under this system, the independence of the *kadi* was beyond question. While the central or imperial authority appointed and removed *kadis*, set administrative limits to jurisdictions, and regularly corresponded with *kadis*, it never interfered in the judicial functions of the *kadi*'s office.⁹ The *kadi* had full discretion to apply substantive and procedural laws to the cases before him and had full independence to consider and admit evidence and to arrive at a decision.¹⁰ Although the court and police were separate institutions, *kadis* had full police cooperation and thus near-complete power to enforce decisions.¹¹ In short, Islam and the Ottoman Empire had brought forth "a court system in the early seventeenth century that had noteworthy success in the realization of its ideals of justice."¹²

Particularly important to our context is that *kadi* courts functioning under this system had a distinct preference for reconciliation between parties rather than enforcement of a judgment.¹³ Many cases, especially those in which neither party was able to furnish conclusive evidence, were settled by intervention and mediation of the *muslihun* (upright Muslims at court).¹⁴ In this process, the parties to the suit reached *sulh* (settlement or compromise) on mutually acceptable terms and surrendered all rights to further claim on the matter.¹⁵ In general, *sulh* had finality and could not be broken;

6. *Kadi, Court, and Legal Procedure*, *supra* note 3, at 133.

7. *Id.*

8. *Id.*

9. *Limitations*, *supra* note 3, at 151.

10. *Id.* at 152.

11. *Kadi, Court, and Legal Procedure*, *supra* note 3, at 141.

12. *Limitations*, *supra* note 3, at 157.

13. *Id.* at 179.

14. *Id.*

15. *Id.*

any subsequent suits brought before a court on a settled *sulh* would be rejected immediately.¹⁶

Apart from this emphasis on reconciliation, the practices and procedures of these *kadi* courts were otherwise uncomplicated. They were aimed at ascertaining the truth and dispensing justice through minimal involvement in procedural intricacies, once again suggesting, in a Western sense, a preference for ADR rather than strict adjudication.

First, although it was possible for both parties to name *wakils*, or attorneys, to represent them in court, such *wakils* were seldom appointed.¹⁷ Self-representation, supplemented when necessary with guidance from the *kadi* on substantive and procedural legal issues, was a more efficient and effective way of resolving disputes.

Second, the confrontation of the defendant by the plaintiff was a fundamental element of the prevalent law, and the testimony of reliable witnesses invariably was accepted at face value.¹⁸ Upon filing of the initial complaint, the defendant was asked to plead innocent or guilty to the allegations made.¹⁹ If he admitted the claim or pleaded guilty, the case was shut there and then and the necessary order was passed in favor of the plaintiff.²⁰ If the defendant denied the claim or pleaded innocent, then proof or witnesses could be summoned.²¹ The plaintiff was required to produce witnesses to prove his claim, and if he produced two reliable witnesses, the case was decided and his claim accepted.²² If the defendant wanted to call his witnesses first, he had to accompany his denial with an affirmative statement contrary to the plaintiff's claim.²³ Hence, if the defendant at the very outset produced two reliable witnesses in favor of his assertion, the court would reject the claim of the plaintiff.²⁴ Other forms of evidence only were admitted when there were no witnesses.²⁵

Third, oaths had key evidentiary status. When both parties to a dispute were unable to produce witnesses or written evidence, then either party could demand that the other swear an oath.²⁶ It was

16. *Id.*

17. *Id.* at 172.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 172-73.

22. *Id.* at 173.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 176.

first the right of the plaintiff to demand an oath of innocence from the defendant.²⁷ If the defendant took the oath, he was cleared of all blame.²⁸ If he refused, that in itself could not be held against him.²⁹ Instead, he might demand an oath of the plaintiff, or else the plaintiff had no case.³⁰

Fourth, courts employed an even less formal procedure in uncontested matters like the sale of land and homes, amicable settlement of estates, appointment of agents, registration of debts, and numerous other business matters.³¹ In such cases, one party simply had to acknowledge the claim in front of the other.³² The acknowledgment could be in response to an earlier suit, but would serve as testimony that both sides found the acknowledged outcome acceptable.³³ The testimony of one party before another signified that both parties were already in agreement and no rules of evidence or other procedure needed to be employed.³⁴ It was not even necessary that the second party reply or comment on the testimony of the first party, although in some cases the second party simply would confirm the statement of the first party.³⁵

Finally, a *kadi* court was specially attentive to the parties appearing before it and conducted its proceedings in an atmosphere devoid of hostility:

While unbiased in its judgments, the . . . court was personal in its methods. Unlike the awesome impersonal judge of western law, the *kadi* was in dialogue with the plaintiff and the defendant. No one hid behind the eloquence of lawyers. Every attempt was made to make unbiased decisions, but personality not impersonality was the basis of the procedure.³⁶

THE SAUDI SUCCESS

Present day Saudi Arabia is one of the few Muslim countries with a legal system that largely adheres to the traditional Islamic model. Based partly on the principles of the seventeenth century Ottoman system enunciated in the previous section, and partly on

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 177.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 180.

related *Qur'anic* teachings, Islamic legal maxims, and Saudi custom, "the great majority" or "99 percent" of all civil cases filed in Saudi Islamic courts end in reconciliation.³⁷ Saudis often quote the legal maxim "*sulh* is best" that originated in the *Qur'anic* verse suggesting amicable divorce for the ill-treated wife: "[I]t shall not be wrong for the two to set things peacefully to rights between them: for *sulh* is best."³⁸

In addition to its emphasis on reconciliation, the Islamic civil law system in Saudi Arabia also adopts a somewhat informal approach to trial. Consequently, the system is opposed to the introduction of professional, Western-style attorneys or advocates into Islamic courts. A *wakil* is allowed only as an agent or proxy (typically a next of kin adult), appearing only in the absence of an actual party, but not as counsel, pleader, or officer of the court.³⁹ Advocates of this system believe that it ensures prompt and efficient resolution of disputes in a direct and informal setting, invariably ending in *sulh*.⁴⁰ They believe that lawyers, on the other hand, use dilatory tactics, add complexity to straightforward matters, distract the parties from their "moral obligations," and "subvert the moral mission of the trial."⁴¹ The system instead relies on the *kadi* as the proper person to protect the parties from any unfair practice and to guide them through the process of adjudication.

A typical trial in the Islamic court focuses on oral, rather than written, proceedings and, at the very outset, the *kadi* asks the plaintiff to present his claim and then requires the defendant to reply.⁴² It is then the *kadi* who dictates an abbreviated version of each statement into the record of the court.⁴³ Although these claims and counterclaims are not presented in the most orderly fashion, the *kadi*'s distillation, arrangement, and documentation of the exchange highlight the relevant facts and home in on the real issues.⁴⁴ Hence, the heart of the dispute is reached through a common-sense mechanism and the *kadi* does not need to employ any formal procedure or rules of evidence.⁴⁵ An exception arises when

37. FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 154 (2000).

38. QUR'AN 4:128, as translated in VOGEL, *supra* note 37, at 154.

39. *Id.* at 160.

40. *Id.*

41. *Id.*

42. *Id.* at 152.

43. *Id.*

44. *Id.*

45. *Id.* at 152-53.

most facts enter the record through exchange and documentation but a few remain disputed. In such a situation, the court may turn to the formal evidentiary process.⁴⁶ In many cases, however, this formal process is never commenced because the parties are able to settle their dispute, inevitably with the help of the *kadi*.⁴⁷ If reconciliation is reached, the *kadi* will, if the parties so desire, approve their agreement, reflect it in the record of the court, and pass a judgment for its performance.⁴⁸ If the parties reconcile privately and do not wish the case to become part of the public record, the plaintiff simply withdraws the suit.⁴⁹

Settlement lies at the heart of the practical adjudication process in Saudi Arabia, not as a mere convenience, but as a basic norm. Yet the agreement of parties cannot override God's law and *sulh* only can yield outcomes that are permissible under such law. As Caliph Omar⁵⁰ explained, "Compromise [*sulh*] is permissible between the people, except a compromise which would make licit that which is illicit or make illicit that which is licit."⁵¹

Subject to the aforementioned limitation, Saudi jurists cite two reasons for their emphasis on reconciliation. The first is that *sulh* conveys "religious blamelessness" on the *kadi* and the parties.⁵² The second is that formal adjudication may breed hatred between parties while reconciliation brings them together.⁵³ This view finds support in traditional Islamic law texts on the art of adjudication: Caliph Umar is reported to have said, "Turn away the litigants, in order that they reach *sulh*, because judgment creates feelings of spite among a people."⁵⁴

Kadis in the Saudi legal system are not mere adjudicators; they possess great skills as mediators and conciliators. For example, if a *kadi* believes that a settlement or compromise would yield a just outcome, he will aim—sometimes even forcefully—to persuade the parties before him to come to an agreement and settle their dis-

46. *Id.* at 153.

47. *Id.*

48. *Id.* at 154.

49. *Id.*

50. Caliph Omar was the second Caliph (religious leader or ruler) of Islam after the death of the Prophet Mohammed. One of the "Rightly Guided" Caliphs, Omar is known for his extensive interpretations of Islamic principles.

51. David S. Margoliouth, *Omar's Instructions to the Kadi*, J. ROYAL ASIATIC SOC'Y 307 (Apr. 1910).

52. VOGEL, *supra* note 37, at 154.

53. *Id.* (describing an interview with Shaykh al-Muhanna, *kadi* of the Great Sharia Court of Riyadh).

54. *Id.* at 154-55 (quoting 'ATWA, MUHĀDARĀT, 37).

putes amicably.⁵⁵ *Kadis* do not rely on religious exhortations alone, but also press practical considerations into service such as that *sulh* may have advantages beyond religious benefits for both parties in that it can avoid harsh outcomes.⁵⁶ As always, however, the *kadi* must remain completely impartial, showing no more favor to an affluent party than to an indigent one.⁵⁷ He also must clarify rather than direct.⁵⁸

Despite all its perceived advantages, a major drawback of this emphasis on *sulh* is that it may be abused by an inept, lazy, or procrastinating *kadi* to cover up his shortcomings.⁵⁹ It also can prevent a matter from being adjudicated under customary law that could have lead to just solutions. Worse yet, *sulh* keeps *kadis* from applying their minds to actual legal problems and principles, and prevents them from being innovative and exercising independent, interpretive judgment (*ijtehad*) in complicated or novel cases.⁶⁰ This may lead to a dearth of sound substantive and procedural rules addressing modern day problems.

THE MOROCCAN EXPERIMENT

The Moroccan legal structure, in contrast to Saudi Arabia's traditional Islamic legal system, is a combination of Islamic law and French and Spanish civil law systems. Although alternative dispute-processing mechanisms based on Islamic tradition exist in the country at an informal level, nearly three decades ago Morocco established its own brand of alternative courts, which thwarted rather than promoted the ends of justice and failed to win the confidence of the public at all levels.⁶¹ Examination of this botched attempt reveals the fact that attempts at alternative mechanisms do not always succeed and are more likely to succeed if they are rooted in the traditional Islamic spirit.

The structure of alternative courts was set up in Morocco through laws passed in 1974.⁶² These courts were to function in

55. *Id.* at 156.

56. *Id.* at 156-57.

57. *Id.* at 158.

58. *Id.* "[The *kadi*] cannot suggest to one party a way of advancing his case, but he can aid a plaintiff in making clear his claims, and he can intervene with the plaintiff on behalf of the defendant seeking leniency or forgiveness." *Id.* (citing 'ATWA, MUHADARAT, 110-11; al-QARI, MAJALLAT, § 2074).

59. *Id.* at 157.

60. *Id.*

61. ROSEN, *supra* note 5, at 119-21.

62. *Id.* at 115-16 (citing Morocco's laws, Royaume du Maroc (1975a) and Royaume du Maroc (1975b)).

rural areas, apply local custom, decide matters involving small amounts in dispute, and allow for no appeal against their decisions.⁶³ Their main objective was to provide speedy justice, to unburden the regular courts, and to stand for local beliefs and ideals.⁶⁴

Scholar Lawrence Rosen's "day in an alternative court" observations describe the alternative court, in overall appearance, to be a mirror image of the regular court in all respects.⁶⁵ He found that the court typically convened once a week with about a dozen cases on the docket and was staffed by a judge (elected to a three-year term by certain eligible members of the rural community) and two experts possessing sound knowledge of local property and customs.⁶⁶ The court generally heard cases concerning rent, credit, trespass, and other petty disputes involving property.⁶⁷ Parties presented their cases themselves instead of through counsel.⁶⁸

The court's dispensation of justice, however, fell far short of satisfactory. The slipshod manner in which cases were handled only ensured speedy disposal, and almost every litigant was upset by the judge's decision.⁶⁹ The judge did not apply local custom in any systematic manner, and the court was subjected to constant executive interference.⁷⁰ Studies of rural courts conducted over the course of many years demonstrate that these were "themes" that were being "repeated many times."⁷¹

[These courts] do not, in fact, utilize local custom or any body of recognized law and for that reason seem . . . to have no recognizable process, nothing they can get a grip on, no point of attachment through which they can formulate their arguments or draw on their connections and experience to configure a set of supporting ideas and associations The rural courts fail by cutting short the inquiry and issuing decisions that merely split the difference so that both parties feel that they have not had "their day in court."⁷²

63. *Id.* at 112.

64. *Id.*

65. *Id.* at 112-21.

66. *Id.* at 113-14.

67. *Id.* at 113.

68. *See id.* at 114-15.

69. *Id.* at 120.

70. *Id.* at 119-20.

71. *Id.* at 115.

72. *Id.* at 120-21.

This system of alternative courts also was examined very closely by the Moroccan legal community,⁷³ which voiced more or less the same set of concerns as the country's general populace: the laws that instituted and regulated these courts suffered from vagueness and led to the appointment of incompetent judges; there were no safeguards against interference of the executive in judicial matters; the laws to be applied by these courts were inadequately described; and the absence of the appeals process had not simplified matters in any way.⁷⁴ The court systems in the traditional Islamic settings described earlier would not have faced such criticisms.

Outside of these much criticized alternative courts, however, Islamic tradition has provided to Moroccans an effective set of mechanisms to address their actual or potential differences. These involve, essentially, various types of individual or group intermediaries who can act as go-betweens to mend damaged relations between parties, request forgiveness or consideration, arrange marriages, reconcile estranged spouses, and arrange amicable divisions of estates.⁷⁵

These intermediaries, or "go-betweens," are called *wasita*, derived from a word that means "middle."⁷⁶ A *wasita* goes alone without the petitioner to see the other party and typically is employed for the resolution of a dispute or to provide introduction to a commercial client.⁷⁷ Such intermediaries are used widely, so much so that "they are to the proper functioning of society what food is to the proper functioning of the body."⁷⁸ A group of people acting as intermediaries is referred to as '*ar* and is normally employed by an individual to seek forgiveness or consideration from the person petitioned.⁷⁹ Two other types of groups that may be employed for more serious matters are the *meshikha*,⁸⁰ a group of pious or respectable people, and *damen*,⁸¹ who are guarantors in business transactions.

The noteworthy aspect of these ADR mechanisms, borne from the Islamic tradition, is that they provide the populace with a much

73. The League of Moroccan Attorneys held a symposium in 1976 to analyze the new courts. *Id.* at 116.

74. *Id.* at 116-18.

75. *Id.* at 122-23.

76. *Id.* at 122.

77. *Id.*

78. *Id.*

79. *Id.* at 122-23.

80. *Id.* at 122.

81. *Id.* at 124.

more satisfactory solution to its problems than rural courts set up through legislation.⁸²

CONCLUSION

According to al-Sarakhsi, a noted Islamic scholar, dispensation of justice "constitutes one of the most noble acts of devotion."⁸³ According to another scholar, Kasani, "It is one of the best acts of devotion," and "one of the most important duties, after belief in God."⁸⁴ These sayings are an acknowledgment of the extraordinary responsibility of the *kadi* or Islamic judge in the multiple roles he plays as an adjudicator, mediator, and conciliator.

An ADR mechanism is embedded in the Islamic concept of dispensation of justice through the traditional emphasis on *sulh*. This is highlighted by the procedures and processes employed in traditional Islamic systems of the seventeenth century Ottoman Empire as well as the present day Saudi Arabia. The failure of modern day Morocco's alternative court system could be attributed, among other things, to its departure from the traditional Islamic spirit. Unfortunately, our examination of the traditional models also leads to another unequivocal conclusion—that Western-style lawyering runs counter to the Islamic notion of ADR, and, with the blessing of the parties, it is the *kadi*, and the *kadi* alone, whose "work is crucial to the determination of truth, administration of justice, and maintenance of peace in our society."⁸⁵

82. *Id.* at 123.

83. Emile Tyan, *Judicial Organization*, in *LAW IN THE MIDDLE EAST* 243 (Majid Khadduri & Herbert J. Liebesney eds., 1955) (citing SARAKHSI, *AL-MABSUT*, VOL. XVI, at 67 (1324) (internal quotation marks omitted)).

84. *Id.* (citing KASANI, *BADAI AL-SANAI FI TARTIB AL-SHARAI*, VOL. VII, at 4 (1910) (internal quotation marks omitted)).

85. Russell G. Pearce, *Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 *FORDHAM L. REV.* 1075, 1082 (1998).



PROTESTANT PERSPECTIVES ON JUSTICE AND ZEALOUS REPRESENTATION

Randall G. Styers*

In 1991, the theologian Stanley Hauerwas published an article with a startling title: *The Politics of Justice: Why Justice is a Bad Idea for Christians*.¹ The question I will address is whether a lawyer can zealously represent a client without violating the lawyer's religious or humanistic beliefs. Hauerwas's perspective on the notion of justice raises a number of issues relevant to our consideration of this question.

At first glance, the question of zealous representation would seem rather extraneous to many American Protestants, particularly given the historical role of Protestantism in shaping the nation's political and legal institutions, and the powerful traditions in Protestant thought that have worked to cordon issues of faith away from our economic and professional lives. Yet a growing number of contemporary Protestant theologians have come to question the degree to which the Christian faith can be reconciled with the values of the broader American political and legal system.² Hauerwas's perspective on the issue of justice is indicative of this trend, and we will benefit from considering the logic underlying his viewpoint. After introducing this perspective, I will turn to consider more directly its bearing on this question, and some of the issues to which it points us.

Stanley Hauerwas is one of the most prominent and controversial Protestant theologians in America today. He has written extensively on the relation of the Christian church to liberal society, with the brunt of his criticism directed against the ways that establishment Christianity, in both its liberal and conservative varieties,

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1. STANLEY HAUERWAS, *The Politics of Justice: Why Justice Is a Bad Idea for Christians*, in *AFTER CHRISTENDOM?* 45, 45-68 (1991).

2. See generally *THEOLOGY AFTER LIBERALISM: A READER* (John Webster & George P. Schnier eds., 2000); STANLEY HAUERWAS, *A Christian Critique of Christian America*, in *CHRISTIAN EXISTENCE TODAY* 171, 174-80 (1988).

has accommodated itself to the broader culture.³ As Hauerwas explains, this accommodation has been spurred largely by the desire of many Christians to exercise influence—and control—over political power.⁴ He argues that in their enthusiasm for political power and its attendant benefits, American Christians “have failed in [their] responsibility to this state by domesticating the Gospel”⁵ The church has become so engaged in the task of legitimating the liberal American state that it has lost sight of its own distinctive character and values.

In response, Hauerwas argues, the church should more properly see itself as standing in a position of critical opposition to all forms of political power and the violence with which that power is maintained.⁶ Protestant (and, increasingly, Catholic) Christianity has compromised that oppositional status by acquiescing to the role of a civil religion,⁷ becoming “a court religion held captive to the interests of a nation-state.”⁸

3. See generally STANLEY HAUERWAS, *A COMMUNITY OF CHARACTER: TOWARD A CONSTRUCTIVE CHRISTIAN SOCIAL ETHIC* 11-12 (1981); STANLEY HAUERWAS, *AGAINST THE NATIONS: WAR AND SURVIVAL IN A LIBERAL SOCIETY* 17-19 (1985). Hauerwas tempers his critique of liberal democracy with acknowledgment of liberalism's achievements, particularly with regard to the imposition of limitations on state power “in order to encourage public cooperation for the maintenance of good community.” Stanley Hauerwas, *Will the Real Sectarian Stand Up?* 44 *THEOLOGY TODAY* 93 (1987).

4. Hauerwas rejects “the very idea that Christian social ethics is primarily an attempt to make the world more peaceable or just.” Instead, he asserts that “the first social ethical task of the church is to be the church—the servant community [W]hat makes the church the church is its faithful manifestation of the peaceable kingdom in the world. As such the church does not have a social ethic; the church is a social ethic.” STANLEY HAUERWAS, *THE PEACEABLE KINGDOM: A PRIMER ON CHRISTIAN ETHICS* 99 (1983).

5. Stanley Hauerwas, *Freedom of Religion: A Subtle Temptation*, 72 *SOUNDINGS* 317, 318 (1989).

6. See HAUERWAS, *A COMMUNITY OF CHARACTER*, *supra* note 3, at 12. “The church does not exist to provide an ethos for democracy or any other form of social organization, but stands as a political alternative to every nation, witnessing to the kind of social life possible for those that have been formed by the story of Christ.” *Id.* See generally STANLEY HAUERWAS & WILLIAM H. WILLIMON, *WHERE RESIDENT ALIENS LIVE: EXERCISES FOR CHRISTIAN PRACTICE* 11-28 (1996) (describing Christians as “resident aliens” and the church as a colony or island among other cultures); Anthony B. Robinson, *The Church as Countercultural Enclave*, 107 (23) *THE CHRISTIAN CENTURY* 739, 739-41 (1990). On the central role of pacifism in Hauerwas's critique of the liberal nation-state, see Hauerwas, *Will the Real Sectarian Stand Up?*, *supra* note 3, at 93-94; HAUERWAS, *AGAINST THE NATIONS*, *supra* note 3, at 127; John Milbank, *Critical Study*, 4 *MODERN THEOLOGY* 213 (1988).

7. Hauerwas, *Freedom of Religion: A Subtle Temptation*, *supra* note 5, at 321.

8. *Id.* at 319.

It is in this context that Hauerwas questions the prominence given to the rhetoric of justice by Christian theologians and ethicists. Hauerwas begins his essay on the politics of justice by underscoring the widespread agreement among contemporary American Christians that justice is a central theological value.⁹ A generic language of justice and rights has come to shape Christian social witness so deeply as to displace any alternative idiom.¹⁰ Hauerwas is skeptical of this rhetoric, cautioning that contemporary invocations of justice actually may serve to “underwrit[e] presuppositions about social life that are incompatible with how Christians are taught to regard and care for one another.”¹¹ Through the course of this essay, Hauerwas raises a number of important questions about the notion of justice. I will mention just a few most relevant to the consideration of whether zealous representation is compatible with religious belief.

Hauerwas’s central argument is that abstract appeals to justice commonly take either the form of empty generalities, or are filled with content that Christians properly should question.¹² Liberal political theory itself has great difficulty giving meaning to abstract notions of justice, often vacillating between competing claims of equality and liberty.¹³ Despite the regular invocation of abstract generalities by political theorists and theologians, any substantive account of justice must necessarily be “tradition-dependent”—the product of a concept of right relations drawn from a comprehensive moral tradition.¹⁴ And to the extent that our substantive visions of the good differ, it may well be the case that we do not “share enough to even know what justice might mean.”¹⁵

Many American Christian ethicists have worked to develop general accounts of justice in the attempt to remain responsible social actors without resorting to specifically Christian principles.¹⁶ But in the search for widely-acceptable common ground, these attempts often revert, sometimes inadvertently, to the ideals of Enlightenment-inspired liberal political theory, most notably, its

9. HAUERWAS, *The Politics of Justice*, *supra* note 1, at 45.

10. *Id.* at 46.

11. *Id.* at 48; Hauerwas, *Should Christians Talk So Much About Justice?*, 14 BOOKS & RELIGION 4, 14-15 (1986).

12. HAUERWAS, *The Politics of Justice*, *supra* note 1, at 45-47.

13. *Id.* at 47-48.

14. *Id.* at 49.

15. *Id.* at 49, 60.

16. *Id.* at 58. Hauerwas calls this effort “the contemporary equivalent of a natural law ethic.” *Id.*

individualism.¹⁷ It has become difficult to speak about justice without using a language thoroughly shaped by modern liberal presuppositions about human identity and social order. And more insidiously, allegiance to this liberal notion of justice actually bolsters the coercive power of the nation-state.¹⁸ These efforts by Christian ethicists "have the ironic effect of reinforcing state power, or more accurately, reifying a particular form of state power that Christians should rightly challenge."¹⁹

As Hauerwas states, "[W]e say we want justice but I suspect even more that we want power—power to do good, to be sure, but power just the same."²⁰ He argues not that Christians should, or could, seek always to avoid power, but rather that one of the most significant problems with liberal accounts of justice is that they often serve to mask issues of power: "[T]he very form of liberty itself may only hide forms of domination. The question is not whether to have or not to have power, but to what end."²¹

Hauerwas turns to the work of Michael Ignatieff for a further important challenge to the liberal notion of justice.²² As Ignatieff argues, the problem with most contemporary political philosophy is not merely that it is individualistic, but rather, in Hauerwas's words, "[T]hat in the absence of any account of the good, individuals are led to believe that all their needs are legitimate. Justice, thus construed, leads to efforts to create societies that are free of constraints upon the needs of its members."²³ The effort to meet these unconstrained needs leads to ever-growing forms of violence and domination.²⁴ Yet in their zeal to conform to the broader culture, Christians settle for mere procedural accounts of justice in which all private versions of the good are equally viable, rather than offering a critical and substantive account of the good.²⁵

17. *Id.* at 52-53.

18. *Id.* at 48.

19. *Id.* at 58.

20. *Id.* at 60.

21. *Id.* at 60-61.

22. *Id.* at 61 (citing MICHAEL IGNATIEFF, *THE NEEDS OF STRANGERS* (1985)) (footnote omitted).

23. *Id.* Hauerwas also quotes LESLIE NEWBIGIN, *FOOLISHNESS TO GREEKS: THE GOSPEL IN WESTERN CULTURE* 27 (1986) stating that "since the pursuit of happiness is endless, the demands upon the state are without limit. If, for modern Western people, nature has taken the place of God as the ultimate reality with which we have to deal, the nation-state has taken the place of God as the source to which we look for happiness, health, and welfare." *Id.* at 66.

24. See HAUERWAS, *The Politics of Justice*, *supra* note 1, at 61-62.

25. Hauerwas, *Should Christians Talk So Much About Justice?*, *supra* note 11, at 14.

Without a fundamental sense of human community and a shared sense of good, we are left with a bleak prospect for any form of substantive justice in the regime of the liberal state.

In Hauerwas's view, an appropriate Christian language of justice would apply not so much to political and social institutions, as to character: contrary to the assumptions of liberalism, it is impossible to have "a just social system without people being just."²⁶ In contrast to the rhetoric of individual autonomy and freedom that animates liberal conceptions of justice, Hauerwas asserts that Christianity teaches a radically different norm:

[A] life freely suffers, that freely serves, because such suffering and service is the hallmark of the Kingdom established by Jesus. As Christians we do not seek to be free but rather to be of use, for it is only by serving that we discover the freedom offered by God.²⁷

The liberal notion of freedom as autonomy is countered by a Christian notion of freedom that "literally comes by having our self-absorption challenged by the needs of another."²⁸ Adopting the language of justice and liberation as central to Christianity leads to the risk that "the distinctive witness of the church can be unwittingly lost."²⁹ Although Christians might adopt pragmatically the liberal language of contemporary democratic society, they always must be mindful of the limits of such rhetoric and vigilantly maintain their primary moral identity as Christian believers.³⁰

As Hauerwas concludes:

In the interest of working for justice, Christians allow their imaginations to be captured by concepts of justice determined by the presuppositions of liberal societies, and as a result, contribute to the development of societies that make substantive accounts of justice less likely. Out of an understandable desire to be politically and socially relevant, we lose the critical ability to stand against the limits of our social orders. We forget that the first things as Christians we have to hold before any society is not justice but God Attempts to ground justice in abstract

26. *Id.* at 15. Hauerwas continues: "The attempt to create such systems end in creating greater state power in the name of doing justice." *Id.*; see Stanley Hauerwas, *The Church and Liberal Democracy: The Moral Limits of a Secular Polity*, in *A COMMUNITY OF CHARACTER*, *supra* note 3, at 73.

27. HAUERWAS, *The Politics of Justice*, *supra* note 1, at 53-54.

28. *Id.* at 54.

29. *Id.* at 55.

30. RICHARD A. MCCORMICK, S.J., *NOTES ON MORAL THEOLOGY: 1981 THROUGH 1984*, at 23-25 (1984).

rights and/or contractual agreements can only result in ideal theories that distort our moral capacity even further. As Christians we will speak more truthfully to our society and be of greater service by refusing to continue the illusion that the larger social order knows what it is talking about when it calls for justice.³¹

There is much to be said about Hauerwas's view of Christianity and the liberal state. As I noted above, his theological perspective is quite controversial.³² And the great majority of Christian theologians, particularly theologians developing theological resources for alternative dispute resolution ("ADR"), find the language of justice essential to their tasks.³³ Yet Hauerwas's fundamental critique of Enlightenment liberalism and its values is echoed by a large number of contemporary Protestant theologians across the political and theological spectrum,³⁴ and this critique of liberal val-

31. HAUERWAS, *The Politics of Justice*, *supra* note 1, at 68.

32. Recurrent major lines of criticism of Hauerwas' work include the following. (1) Some critics argue that he is insufficiently attentive to the pluralism and conflict within various Christian traditions. *E.g.*, John D. Barbour, *The Virtues in a Pluralistic Context*, 63(2) *THE JOURNAL OF RELIGION* 175, 177-78 (1983); William Daniel Cobb, *Pluralism and Ethics: Toward a Reconstruction of Value*, 47(4) *ENCOUNTER* 309, 318 (1986); Linell E. Cady, *Foundation vs. Scaffolding: The Possibility of Justification in an Historicist Approach to Ethics*, 41(2) *UNION SEMINARY Q. REV.* 45, 52-53 (1987). (2) Some argue that he offers an unpersuasively static and bifurcated view of the relation between the church and the world. *E.g.*, Robinson, *The Church as Countercultural Enclave*, *supra* note 6, at 740-41; Milbank, *Critical Study*, *supra* note 6, at 214-15. (3) Some find his account of how theological critique and change occur within the church to be inadequate. *E.g.*, Todd Whitmore, *Beyond Liberalism and Communitarianism in Christian Ethics: A Critique of Stanley Hauerwas*, in *THE ANNUAL OF THE SOCIETY OF CHRISTIAN ETHICS* 207, 208-13 (D.M. Yeager ed., 1989). (4) Finally, some seek a more detailed account of the virtues involved in the relations of the church to the broader political community. *E.g.*, Lee H. Yearley, *Recent Work on Virtue*, 16(1) *RELIGIOUS STUDIES REVIEW* 1, 7 (1990); Whitmore, *supra* note 32, at 215-19; Milbank, *supra* note 6, at 214.

33. For an overview, see generally *MEDIATION AND FACILITATION TRAINING MANUAL: FOUNDATIONS AND SKILLS FOR CONSTRUCTIVE CONFLICT TRANSFORMATION* 11-40 (Jim Stutzman & Carolyn Schrock-Shenk, eds. 3d ed. 1995), and the works cited therein. See generally HUGH F. HALVERSTADT, *MANAGING CHURCH CONFLICT* (1991); JOHN PAUL LEDERACH, *BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES* (1997); RUPERT ROSS, *RETURNING TO THE TEACHINGS: EXPLORING ABORIGINAL JUSTICE* (1996); WALTER WINK, *THE POWERS THAT BE: THEOLOGY FOR A NEW MILLENNIUM* (1998); HOWARD ZEHR, *CHANGING LENSES* (1990). For other recent defenses of the notion of justice, see generally SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 26-33 (1989); John Tomasi, *Individual Rights and Community Virtues*, 101 *ETHICS* 521, 521-36 (1991).

34. See generally JOHN MILBANK, *THEOLOGY AND SOCIAL THEORY: BEYOND SECULAR REASON* (1990); *RADICAL ORTHODOXY* (John Milbank et al. eds., 1999); *THE POSTMODERN GOD: A THEOLOGICAL READER* (Graham Ward, ed. 1997); *THEOLOGY AFTER LIBERALISM: A READER*, *supra* note 2.

ues raises a number of issues central to the question at hand. I will focus briefly on three.

First, it is difficult to imagine lawyers abandoning the language of justice, particularly given its rhetorical and persuasive value in the broader efforts to represent our clients. Hauerwas himself acknowledges the value of an ad hoc invocation of the rhetoric of justice.³⁵ But at the very least, Hauerwas presses us to consider exactly what we might mean by that language.³⁶ He underscores the emptiness of much of the generic language of justice,³⁷ and he cautions us particularly against the fallacy of thinking that a notion such as justice—or zealous representation—could be given meaningful content in the abstract.³⁸

Any substantive response to either notion requires concrete engagement in the context of immediate relationships. So, for example, in the proper situation, the most morally appropriate type of legal representation actually will be representation that serves to heighten or escalate conflict. In many circumstances, conflict is essential to the task of building peace.³⁹ There can be no abstract answer to the question of the propriety of zealous representation; any meaningful response will depend on the concrete factors of specific situations.

Second, as we work to give content to these notions of justice and appropriate representation, we err if we see them as primarily procedural. In fact, Hauerwas strongly cautions us against seeing the legal system and its procedures as fundamentally benign.⁴⁰ If we imagine justice as merely a matter of procedure, effective and zealous representation of a client easily can devolve into the naked and aggressive exploitation of those procedures to accomplish the client's objectives. Suffice it to say that a slavish devotion to procedure can mask enormous substantive evil.

But, in fact, it is very difficult to imagine a morally responsible lawyer who could have such a constricted view of their responsibilities in representing a client. As we consider the nature of zealous

35. Hauerwas, *Should Christians Talk So Much About Justice?*, *supra* note 11, at 15, (citing MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENCE OF PLURALISM AND EQUALITY* (1983) as an useful example of more modest invocation of the concept of justice).

36. *Id.* at 14.

37. *Id.*

38. *Id.* at 14-15.

39. For various theological materials, see generally *MEDIATION AND FACILITATION TRAINING MANUAL*, *supra* note 33.

40. See *supra* notes 22-25 and accompanying text.

representation, Hauerwas demands that we reposition justice within a much broader constellation of theological and moral values.⁴¹ Christian theology teaches not a justice that is primarily procedural, but rather one that is substantive to its core.⁴² What is important in human life is not just the protection of abstract rights or procedural equality—surely the lowest common denominator of an atomized society. Although there is an important place for that minimal standard, a place that Hauerwas perhaps underestimates, Christianity teaches that the objective of our labor should be a community in which each member flourishes, with our individual and collective goals shaped by mutuality and commitment.⁴³

This perspective harmonizes particularly with methods of ADR. The ADR movement is motivated in large measure by an awareness of the limitations of traditional adversarial models of conflict resolution. At its very best, ADR seeks to open a space for “transformative peacemaking”⁴⁴ in which we can build more substantive and mutually beneficial relationships.⁴⁵

Third, Hauerwas points us away from a vision of justice as freedom from constraint on our desires and toward more substantive notions of justice that inevitably will teach that some desires are worthy and that others are destructive.⁴⁶ As advocates, each of us has had the opportunity to recognize that not all our clients’ professed interests are equally meritorious. Clients’ most pressing and visible short-term goals sometimes run counter to their long-term objectives. The passions of the moment can hide more comprehensive interests, interests that inevitably will involve a broader vision of the client’s position within a wider community. One of the most important responsibilities of an attorney is to aid the client in maintaining a view of this bigger picture. In other settings, Joseph Allegretti has spoken of the attorney-client relationship as constituting a moral community,⁴⁷ and within that community, even in the midst of the most zealous representation, the attorney has an important opportunity to recall the client to this broader

41. HAUERWAS, *The Politics of Justice*, *supra* note 1, at 58-60, 68.

42. *See id.* at 58-68.

43. *Id.*

44. E.g., Larry Dunn, *Mennonite Peacemaking and Conflict Transformation*, in *MEDIATION AND FACILITATION TRAINING MANUAL*, *supra* note 33, at 17.

45. *Id.* at 15-18.

46. *See generally* Hauerwas, *Should Christians Talk So Much About Justice*, *supra* note 11, at 14-15.

47. Joseph Allegretti, *Lawyers, Clients, and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 *FORDHAM L. REV.* 1101, 1121-23 (1998).

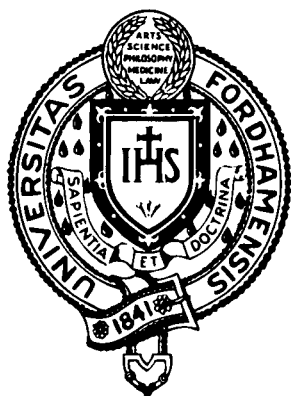
view, to help the client articulate a vision of substantive and mutually beneficial justice.

Again, this perspective fits well with alternative dispute resolution methods. For example, mediation procedures often are designed to move participants beyond their immediate positions toward recognizing and articulating their more substantive interests and values. In this process, positions can alter as participants reflect more deeply on their ultimate objectives.

Thomas Shaffer has stated that religion always should be "a challenge to the comfort of lawyers."⁴⁸ Stanley Hauerwas reminds us that even the most cherished legal and social ideals can be challenged by our faith.⁴⁹ It is surely possible to represent our clients zealously without violating our religious and moral beliefs, but in doing so we will find no comfort in platitudes.

48. Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 *FORDHAM L. REV.* 1089, 1099 (1998).

49. Hauerwas, *AFTER CHRISTENDOM?*, *supra* note 1, at 19-20.



FAITH AND THE LEGAL PROFESSION: A RESPONSE*

Louis A. Craco**

On November 1, 1945, my father, one of the prominent auctioneers of the day, sold a picture at auction for the highest price that had ever been fetched for an oil painting in the history of the world, a paltry \$375,000. The event, which was vivid in our family history, came to mind in the course of preparing for this Dialogue today. You can go up a few blocks to the Frick Collection and see the painting yourself. There it is, one of the several early renditions by El Greco of the "Purification of the Temple," showing Christ, in full cry with knotted cords raised above him, driving the money changers from the temple. According to Saint Matthew, Christ said, "Do you not know that my Father's house is a house of prayer? And you have made it a den of thieves."¹

It is pure advocacy. He states a claim of another, His Father, in righteousness, and forcefully asserts it against those who intrude upon it unjustly.

I thought of this because it seems to me not at all clear that I can avoid the role of being a skunk at the garden party. Having eaten well of our hosts' crullers and coffee, and recognizing the dedication of CPR to the pacific resolution of disputes, I want to present a different point of view for a moment and suggest what I think is missing in what I have heard so far today. I want to respond from the standpoint (that Matt Boylan and Jack Weiser and some other people here in the room will recognize as an Ignatian insight) of discerning that our faith must work in the world as it is.

Now to do that, I am afraid you will have to indulge my being personal. I think it is right, as one of our prior speakers said, that

* These remarks were given extemporaneously in response to the panelists at the *Dialogue on the Practice of Law and Spiritual Values*, 28 FORDHAM URB. L.J. 991 (2001). Only slight editorial changes have been made and footnotes added in order to clarify the speaker's comments for the reader.

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1. *Matthew* 21:13.

we have to give witness, we have to give testimony.² And the witness and testimony that a responsible Christian gives is not so much what he or she says, not even so much what he or she does, but what he or she is. So you will forgive me if I take a stance that is somewhat personal.

I think that I *am* trying to do what Professor Allegretti talks about when he speaks of a vocation.³ It may be that after forty-five years of litigation practice in New York City—in the courts of this state and in others, and having been given the opportunity to think and talk seriously about professionalism at the highest levels of the New York State legal system—I am invited—called—to think about what professionalism might be at its most meaningful. It may be simply that I have read *Ulysses*, I mean Tennyson's poem, too many times and think "Something ere the end, Some work of noble note, may yet be done."⁴ But let me try anyway.

I do not want you to hear me to say that I disrespect in any way the massed consensus of monotheistic religions of the world and of ethical humanism that peace is better than combat. On the contrary, as I read the conference papers furnished to us in advance, I must tell you I was moved beyond anything that I have read recently by any spiritual writer, by Baruch Bush's paper, which in its fullness—which he had not the opportunity to provide in his remarks—is a transcendently beautiful conception of the role of the peacemaker.⁵ But what I do fear in the emerging interest in religion and the law is an emerging orthodoxy about the relationship of religion and the law. It is a view that depends in some respects on generalizing from marginal practitioners of the law depicted in cartoons as hired guns, on the one hand, and talking about obvious propositions like the assertion that peace is better than war, on the other. That leaves the 165,000 New York lawyers⁶ who work out their salvation as well as their livelihood, every day serving clients without much guidance or, I fear, hope.

2. Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 FORDHAM URB. L.J. 1017 (2001).

3. Joseph Allegretti, *A Christian Perspective on Alternative Dispute Resolution*, 28 FORDHAM URB. L.J. 997 (2001).

4. ALFRED LORD TENNYSON, *Ulysses*, in TENNYSON'S POETRY 52, 53 (Robert W. Hill Jr., ed. 1971).

5. Robert A. Baruch Bush, *Mediation and ADR: Insights From the Jewish Tradition*, 28 FORDHAM URB. L.J. 1007 (2001).

6. See ETHICS INST. SUBCOMM., N.Y. STATE JUDICIAL INST. ON PROFESSIONALISM IN THE LAW, REPORT OF TASK FORCE ON ATTORNEY PROFESSIONALISM AND CONDUCT 9-10 (May 1998) (noting that New York State is the second largest bar in the United States).

So let me tell you a little bit where I come out on this. This may not be an "Archimedean point" from which to examine the questions we have been discussing⁷ (although in other contexts I am precisely suggesting that it is), but it is my point of reference on the question of virtuous lawyering.

When you examine them seriously, the keynotes of American professionalism are two. First, it is a helping profession. It offers assistance to persons in need and invites reliance on special skill and judgment. And second, it is radically a public profession. I do not care whether you are doing a contract in the offices of Sullivan & Cromwell, or something equally private, or whether you are in court. You are employing the coercive force of the state to give meaning to what you do. You are invoking the public law, even in private transactions. There are implications—which are well beyond the seven minutes that I am allowed today—that flow from those two things.

I want to talk for a moment only about the second, the nature of American law as a public calling. I emphasize that this is an American characteristic. American lawyers are called, I would argue, to manage the tensions that are built into the American experiment, built as that experiment is on a whole series of great oxymorons. "Ordered liberty." "One from many." We have as our fundamental task the continuous adjustment of those tensions in the culture. We do it by a process that, in a new book that just came to my desk today from CPR containing think pieces on various aspects of lawyering, Mr. Piazza correctly identifies as a Hegalian dialectic of thesis, antithesis, and synthesis.⁸ We do it by assertion and defense and adjudication of claims of right, claims of justice.

We manage those tensions, many very fundamental, and manage those assertions of claims and defenses against them, many very important to the parties or the public, by a process that avoids achieving resolution the way they did in Serbia. That is no small achievement.

This is a distinctive role for the American lawyer and that in turn exposes a distinction that is important from some of the things that we have heard today. The American lawyer's role is distinctive be-

7. Cobb, *supra* note 1.

8. Antonio C. Piazza, *Mediation v. Litigation*, in *Into the 21st Century: Thought Pieces on Lawyering, Problem Solving and ADR*, 19 ALTERNATIVES TO HIGH COST LITIG. 55 (2001). *Into the 21st Century* was a special book-length issue of the CPR Institute for Dispute Resolution's newsletter *Alternatives to the High Cost of Litigation*.

cause of America's heterogeneity, and because we hold ourselves out as including the "other," not expelling the "other." And, consequently, the law, and the characteristics and ethos of the law from which the ethics of law flow, have to take into account the fact that we are not a homogeneous community like biblical Israel or seventeenth century Ottoman Turkey or Saudi Arabia or the Corinth of Saint Paul. We have, as the last speaker said, trippingly, but vitally, "vacillating . . . claims of equality and liberty" with which we have to deal always.⁹

We deal with them largely through the adversary system. That is meant to provide an alternative system to strife or the expulsion of the "other." Those of you who came here from Westchester may well have come down the Hutchinson River Parkway, tracing the route Anne Hutchinson traveled when she dealt with her difference with the Massachusetts Bay community by getting the hell out of there.¹⁰ We no longer have to do that. We have not the space for either opportunity or difference to be accommodated by setting up shop someplace else. And as our society becomes more heterogeneous, as our Islamic populations grow, as communities of color grow, as immigration grows, these demands and tensions will be greater, not fewer. The implication of this is that we must recognize the adversary system for what it fundamentally and philosophically is—an alternative system to strife or the exclusion of others. It is a peacekeeping system.

Now I recognize that there is available, and indeed made by Hauerwas and others, a systematic, radical (and I mean that in its root sense) attack both on the American liberal democratic experiment itself and then on the adversary system as an adjunct of it.¹¹ I do not mean either to deprecate the rightness of bringing those questions up or their relevance to another discussion than this one. What I do mean to say is that the adversary system has a place, indigenous to the United States, which is honorable and is capable of being carried out with virtue.

9. Randall G. Styers, *Protestant Perspectives on Justice and Zealous Representation*, 28 FORDHAM URB. L.J. 1047 (2001).

10. CHRISTINE A. LUNARDINI, *SOCIAL ISSUES IN AMERICAN HISTORY SERIES: WOMEN'S RIGHTS* 13-14 (1996) (explaining that Hutchinson's banishment from the Massachusetts Bay Colony eventually resulted in her move to New York).

11. STANLEY M. HAUERWAS, *CHRISTIAN EXISTENCE TODAY: ESSAYS ON CHURCH, WORLD AND LIVING IN BETWEEN 171-90* (1988); STANLEY M. HAUERWAS, *AFTER CHRISTENDOM?: HOW THE CHURCH IS TO BEHAVE IF FREEDOM, JUSTICE, AND A CHRISTIAN NATION ARE BAD IDEAS* 45-68 (1991).

I also do not mean to be heard as saying that I defend the abuses of the adversary system. I really was delighted that Mr. Iqbal was able to answer with candor what is absolutely true of my experience,¹² that every day in my firm people are told how to behave well. The first thing we do when we get new lawyers into the firm is take them away for a week and drum it into their heads that we care that they behave well—behave well in the adversary system and in the negotiation processes that they will engage in. It is simply an irresponsible abdication of the real question before us to think that the abuses are the practice. They are not.

When you asked the question, Professor Pearce, about Luban's criticism of the so-called "standard" model¹³ for running contrary to the teachings of Christianity,¹⁴ I whispered to Jack Weiser that I did not so much think it was against Christianity as it was against the facts. The standard model of practice as described by Luban, who of course has his own radical agenda to propose, is simply not the standard practice we see every day. Indeed, if I were to pick out an abuse of the adversary system that I think is the gravest of our abuses, it is none of the ones that you heard about today. I think the biggest abuse of the adversary system is its systemic failure to provide even access to justice across the spectrum of American diversity. And the remedy to that, when you think about it, actually tends to promote more, not less, use of the advocacy process.

I do not want to be heard, either, as denigrating the role of the peacemaker in the practice of law. I do not mean at all to be heard as rebutting the notion that the lawyer has a genuine role as healer. My point simply is this: those models do not exhaust the possibilities of the ways to be genuinely virtuous in the practice of the law, where advocacy and the prophetic voice are in context more often than suggested here, both required and righteous.

Rather I would propose some additional models that are very simple. I want to leave you not with a critique, but a proposal. I

12. Walid Iqbal, *Courts, Lawyering, and ADR: Glimpses into the Islamic Tradition*, 28 FORDHAM URB. L.J. 1035 (2001).

13. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xx (1988) (commenting that the "standard conception" of the lawyer's role consists of "(1) a role obligation ('the principle of partisanship') that identifies professionalism with extreme partisan zeal on behalf of the client and (2) the 'principle of nonaccountability,' which insists that the lawyer bears no moral responsibility for the client's goals of the means used to attain them").

14. Comments of Professor Russell G. Pearce at the *Dialogue on the Practice of Law and Spiritual Values* (Jan. 25, 2001) (unpublished transcript, on file with the FORDHAM URBAN LAW JOURNAL).

believe we can think of lawyers, virtuous lawyers in all of the major religious traditions, as occupying two paradigms that fit all of the requirements that we have been talking about. One is a role as leader and the second is a role as teacher. Many of the conundrums that have been presented to us—for example, “what would you do when your senior partner says this to you”—invite a dialogue with that partner or between that partner and the client that teaches him something and that uses the capacities of leadership to try to draw someone to a more attractive solution. Not necessarily successfully, but with the objective of advising wisely, of encouraging and of empowering, which is what I think we should be about. And then, if we think about our roles in that way, we can start the day with a prayer to which I am devoted, and I told you I would be personal. It is a prayer essentially of thanksgiving and of dedication; it is the prayer from Isaiah—that “The Lord God has given me a well trained tongue, that I might speak to the weary the word that will rouse them.”¹⁵

15. *Isaiah* 50:4.

THE PRACTICE OF LAW AND SPIRITUAL VALUES

John W. Weiser*

Let me begin with a wonderful phrase, "It's simple, but it's not easy." We usually know what we ought to do; doing it is another thing.

There are two basic Commandments that, I believe, are at the heart of the Abrahamic traditions represented on this panel: Love God and love your neighbor.¹ Both of these Commandments speak of a relationship with another. And I have long thought that our over-riding objective is to work to strengthen and enrich the relationships we have, make them more productive and more positive, and to resist actions that fray those relationships.

Not long ago, I read that recent work in quantum physics suggested that the most fundamental aspect of the universe is relationship.² Particles do not exist in isolation; rather, they are in relationship with another or others and that relationship itself affects their essence. That concept provides rich food for thought.

"Loving our neighbors," that is, recognizing their value and treating them with the requisite respect seems simple, but it's not easy. As Lou Craco, citing Ignatius, explained, we have to see the world as it is; it is the context in which we operate.³ Adam and Eve, we read, were thrown out of the Garden of Eden; they came into the world that we know as imperfect and complicated.

Today, several factors conspire to aggravate the imperfections. We live in an age that puts great emphasis on the rights of the individual. Many years ago, that emphasis was an important corrective to the power of a stifling state and state-like organizations. But in our society, we may have gone too far in focusing on the rights of the individual. We have become the "Me" Generation:

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1. *E.g.*, *Matthew* 22:37-39.

2. MARGARET J. WHEATLEY, *LEADERSHIP AND THE NEW SCIENCE: DISCOVERING ORDER IN A CHAOTIC WORLD* 34-36 (2d ed. 1999).

3. Louis A. Craco, *Faith and the Legal Profession: A Response*, 28 *FORDHAM URB. L.J.* 1057 (2001).

individuals concentrate on their own entitlements and consider less the rights and needs of others or of the community.

Our society also puts a high value on competition. Competition can be healthy and good, as when we push each other to be better and respect each other for the effort. Unfortunately, too many people today believe that winning is the only thing and try to demonize their opponents.

In our public life and in our media, we value the search for truth, but that search seems to have no limits and has degenerated into a politics of personal destruction.

So three valuable ideas—individualism, competition, and the search for truth—have, through excess, become hurtful. Our society has a problem with limits. And limits, it seems to me, would become more apparent and excesses correspondingly curbed, if we spent more time considering the value and needs of others.

The legal system is part of our larger society and cannot help but be affected by the excesses of that society. Clients who believe that they have been wronged naturally focus first on their rights and their position. That narrow view is exacerbated by society's mindset that suggests that each individual's rights are all that matter.

Our courts use the adversary system because we believe it is an effective way to approach the truth in a case. Unfortunately, the system is designed as a zero-sum game (though rarely is anyone 100% right) that emphasizes competition. When society teaches that winning is the only thing and that the opponent is not worthy of respect, abuse of the system is a likely consequence. Furthermore, a system that only allows for one winner will encourage some to try to win at any cost. So costs escalate, leading to a vicious circle. I have had cases in which our costs were running at one million dollars per month. That distorts reality.

Of course, we need a court system. It is the civilized alternative to taking the law into your own hands, but beyond that simplistic level, most of us understand that the threat of litigation is a powerful factor in working to settle a dispute. In most cases you work on parallel tracks—keeping the threat of litigation alive as you try to hammer out a mutually acceptable solution.

In light of the societal pressures on the judicial system, what are we to do to live out our spiritual values? Perhaps because this Dialogue is under the auspices of the CPR Institute for Dispute Resolution, we have focused on litigation and disputes. I will point out later that the "Practice of Law," our subject, has much wider scope, but let me stay with disputes for now. I am not a litigator, but as

general counsel of a major company, I did have responsibility for its legal disputes.

I begin again with our moral compass—"love your neighbor." Treat the other the way you would want to be treated. "That which you think harmful to yourself, do not do to others." Consider the importance and value of the relationship.

It seems simple, but, of course, it's not easy.

When dealing with disputes, you have to work on two levels—first, on the individual case in front of you, and second, on the system as a whole. The individual situation, in my view, requires that you be both buffer and educator. The client in front of you is angry. Professor Bush spoke of making room for the client.⁴ I take that as meaning that you have to listen sympathetically to the client's story and allow him to express his very human emotions.

Then you have to move on to the educational effort. Rather than reinforce the client's anger, the object is to help him to work his way out of that. It is not going to happen at the first session; it takes time. Professor Cobb spoke of making the story more complex.⁵ Working with the client, you elaborate the larger picture. Together you try to understand how the other side perceives the situation; the adversary begins to have a face, and you explore the pragmatic implications of a fight.

In my practice, doing so was relatively straightforward. Most of the disputes I encountered as general counsel were with customers, suppliers, employees—all people with whom our relationships were important. Of course, the executives dealing with specific situations might be mad, but anger and lashing out is rarely a solution.

In that business context, one could recognize the wisdom of the religious traditions that generally prefer settlement to a litigated decision. The latter means that one party wins and the other loses and the loser usually remains angry. Settlement is the preferable way to preserve relationships.

Of course, there are people who know no reason and there are people who are dangerous. If we discovered an employee or contractor who was violating the law, we treated it like cancer and removed the problem quickly and completely. Similarly, if the other side remains intransigent, a fight cannot be avoided. How-

4. Robert A. Baruch Bush, *Mediation and ADR: Insights From the Jewish Tradition*, 28 FORDHAM URB. L.J. 1007 (2001).

5. Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 FORDHAM URB. L.J. 1017 (2001).

ever, my experience has been that situations that seem irretrievable at the outset almost always respond to respect and honest efforts to explore commonalities.

As noted, you also have to work on the system as a whole. Here I point with admiration to Jim Henry, who was the catalyst for this Dialogue.⁶ Jim is a wonderful example of what can be done with steady, focused, positive effort. Twenty years ago, many of us were dismayed by dysfunctional aspects of the judicial system and were searching for alternatives. Jim started us along a path to improvements with the simple alternative dispute resolution pledge: "If you are a member of the club, I won't sue you without discussing alternatives with you first."⁷ Though simple, it was a powerful first step. And Jim has kept us moving along a progressive arc through arbitration, mediation, and interest-based negotiation to this Dialogue, which explicitly deals with the practice of law and spiritual values. One of our panelists, Lou Craco, also has been working for many years at high levels to develop and implement rules for improved professionalism of the bar.⁸

Professor Deming, one of the great gurus of modern business, spoke of "constancy of purpose."⁹ Progress is incremental; it takes many small steps. You work around the really difficult people but keep your eyes on the goal and keep working toward it.

As noted earlier, the panelists have focused on litigation. However, the topic is the "Practice of Law," and litigation, although essential, is only a small part of the practice. If I were to compare the law to medicine, I would say that litigation is like surgery. And there is much more to medicine than surgery; many of us spend busy, productive lives in less adversarial, more cooperative areas of the practice.

I have spent almost all my career in the business world. That work, happily for me, deals mostly with developing mutually beneficial commercial arrangements. I sometimes see myself as an architect of contractual structures, which, like physical structures, have to be balanced and reinforcing to succeed. They must benefit both sides. To design them you must ask yourself what the other side needs and you have to put yourself, and your client, in the

6. James F. Henry, *Introductory Remarks*, 28 FORDHAM URB. L.J. 995 (2001).

7. *See id.*

8. Craco, *supra* note 3.

9. W. EDWARDS DEMING, *OUT OF CRISIS* 23-24 (1986) (outlining fourteen "Points of Management" through which American industry may transform itself for the better).

other guy's shoes. That sort of work seems to me to align readily with the Commandment that you treat the other as you would be treated. In the commercial world, I think it is true that "what goes around, comes around." You will meet again.

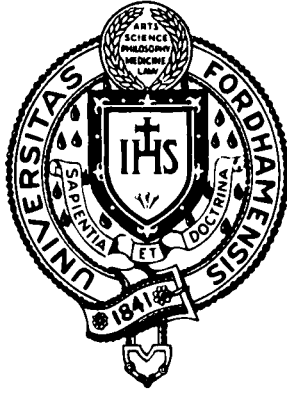
Hence, I always have thought of the hard-ball, "take no prisoners" negotiators, intent on "winning" and "outwitting" the other side as short-sighted. Of course, you have a duty to further your client's interests, but in my experience, the client's interests, particularly in the business world, are rarely short-term. If you outwit the other side, how long will it take them to discover the trick, and what happens to the relationship then? This is a world where leaving an extra dollar on the table may be more an investment than a loss.

At our graduation from law school, the dean told us that we are now learned in "those wise constraints that make men free." What a powerful paradox—that giving a bit, we get more in return; that relationships can be better if we accept some limits on our demands. More powerful and relevant is the suggestion that at the core of the law lies the wisdom that we all benefit as we accept some limits and constraints. The vast majority of our fellow citizens instinctively understand that.

Progress is incremental. We can, if we choose, focus not just on ourselves and our rights, but also on the others and their rightful expectations and on the benefits of cooperation. If we keep constant to that purpose, we may in time achieve that happy, larger world Professor Styers described—"a community where all can flourish."¹⁰

It's simple, but it's not easy.

10. Randall G. Styers, *Protestant Perspectives on Justice and Zealous Representation*, 28 FORDHAM URB. L.J. 1047 (2001).



SPIRITUALITY AND LAWYERING: A PRACTITIONER'S PERSPECTIVE

Stephen P. Younger*

I will start by disclosing my bias: I am a son, not of one, but of two ministers. Growing up, I questioned every tenet of spirituality before I grew to accept it. My first reaction when I was asked to speak among these distinguished panelists was to question whether religion has any legitimate relationship with the practice of law at all. Under the critical analysis techniques I learned in law school, I had to analyze such a subject to the nth degree. I envisioned myself walking into a corporate client's office announcing my firm's new practice area: "Jesus has taught me to turn the other cheek." I also imagined the conversation that my client would have with my managing partner about taking their company's business elsewhere.

Naively perhaps, I said to myself, "I can separate my role as a lawyer from my role as a religious person on weekends and about an hour every night when I get home, before going to bed. I can act as a lawyer during the day. I can do what is right when I teach Sunday school or try to set an example for my children at home."

But reading the literature CPR assembled for this Dialogue led to an epiphany.¹ There is a role for a religious lawyer. There is something religion can teach us about being a better lawyer. Maybe that is what subconsciously drew me to alternative dispute resolution ("ADR"), because it gives one much greater satisfaction as a lawyer to problem solve and reach a mediated result than to beat the pulp out of somebody through conventional litigation tactics.

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1. Joseph Allegretti, *A Christian Perspective on Alternative Dispute Resolution*, 28 FORDHAM URB. L.J. 997 (2001); Robert A. Baruch Bush, *Mediation and ADR: Insights From the Jewish Tradition*, 28 FORDHAM URB. L.J. 1007 (2001); Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 FORDHAM URB. L.J. 1017 (2001); Walid Iqbal, *Courts, Lawyering, and ADR: Glimpses Into the Islamic Tradition*, 28 FORDHAM URB. L.J. 1035 (2001); Randall G. Styers, *Protestant Perspectives on Justice and Zealous Representation*, 28 FORDHAM URB. L.J. 1047 (2001).

There are three main areas in which lawyers can draw on a higher calling. But each of these raises many more dilemmas or tensions than it does solutions.

The first area is exemplified by Joseph Allegetti's example of Tolstoy's Ivan Ilyich.² Ilyich had been a great lawyer and a great judge, yet had never done anything for the world. But it was only when he contracted his terminal illness that he paused to reflect on his life and ask himself, "What have I done for the world?" We, as lawyers, have a higher calling to do more than Ivan Ilyich did to help others during his lifetime, and to reflect earlier than Ivan had the opportunity to do. And we can do that in several ways.

One obvious opportunity to respond to this calling is through pro bono work. We can help the less fortunate who need our services. But we also can help our private clients. We can help them problem solve. We can form relationships with our clients. One of the most rewarding possibilities we have in our practices as lawyers is to be looked on as counselors, not just as hired guns. We can also form relationships with our adversaries. My most efficient litigations have occurred when my relationship with an adversary allowed me to trust that person enough to pick up the phone and reach a satisfactory result. It may not be a solution to the case. It may just be an agreement about how many depositions we are going to take. But the most ineffective and the most unsatisfying results occur when lawyers have to go and see the magistrate every time there is a document demand.

This higher calling can make us more satisfied professionals. Joseph Allegetti is absolutely right that the typical associates of major law firms are completely unsatisfied with their work.³ Pro bono work is the one area from which they obtain true satisfaction. Nevertheless, lawyers can and should try to make their other work for paying clients more satisfying.

My second point can be illustrated by the Thomas Moore example from Joseph Allegetti's book.⁴ Moore, as we all know, faced a great dilemma when Henry VIII demanded that he do something that Moore thought was not right. A modern day example of this is the "Saturday Night Massacre" and how Attorney General Elliot Richardson must have felt when he was forced to resign after refus-

2. JOSEPH G. ALLEGRETTI, *THE LAWYER'S CALLING* 110-18 (1996) (citing Leo Tolstoy, *The Death of Ivan Ilyich*, in *THE COSSACKS/HAPPY EVER AFTER/THE DEATH OF IVAN ILYICH* 99 (Rosemary Edmonds trans., 1960)).

3. Allegetti, *supra* note 1.

4. ALLEGRETTI, *supra* note 2, at 118-22.

ing Richard Nixon's demand that he fire Watergate Special Prosecutor Archibald Cox.⁵

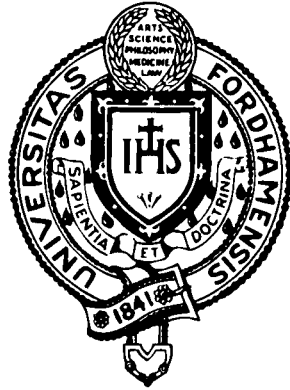
We all have boundaries as lawyers. We have an ethics code that contains boundaries that are quite ephemeral and extremely hard to interpret. When lawyers face moments which push us to the limits of these boundaries, we can look at what our faith teaches us, look at what is moral and what is right. Unfortunately, in day-to-day life there are far more times when ethical practices do not cross over the bounds of professional ethics yet raise our own moral doubts about the cause of action. It is not uncommon that we as lawyers are asked to do things that we do not believe in, but that the client has a right to do.

That raises the third point that I draw out of this literature, which is that we as lawyers can do more than just follow the instructions of our client. We can be problem solvers for our clients. When we encounter a dispute, we should look for a solution. What always troubled me about litigation was that for the first year—even the second and third years—the business problems causing the dispute were never discussed, except critically at a deposition. Instead, what was discussed was how many depositions we were going to take, how many document demands we were going to serve, what kinds of legal causes of action we had or did not have, and what kinds of defenses existed to those causes of actions. Nobody looked for the actual solution to the problem. As lawyers who are active in the alternative dispute resolution world, we should primarily be problem solvers and try to find solutions first.

But not every client wants that solution. Unfortunately, you cannot use ADR as the only tool in your toolbox. If ADR is your only tool, it is like saying, "Come, my client's wallet is open. Take as much as you could possibly want." Thus, as a lawyer you also must have adversarial tools. The real challenge is knowing when and how often to influence your client to do something that they initially feel they do not want to do. That influence must be employed sparingly in order to avoid the risk of alienating clients.

We can be better lawyers when we look to our spiritual values for guidance. But it is very hard. There are many difficult situations we face in which there are no perfect solutions, regardless of our religious values. But if we draw upon our intuition to help solve these difficult problems, we can all become better as lawyers.

5. James M. Naughton, *His Defense Is an Offense; Evidence Is Yet to Come*, N.Y. TIMES, Nov. 18, 1973, § 4, at 1.



AND NOW A WORD ABOUT SECULAR HUMANISM, SPIRITUALITY, AND THE PRACTICE OF JUSTICE AND CONFLICT RESOLUTION

*Carrie Menkel-Meadow**

The papers presented in this Dialogue raise very important and moving questions about the relationship of spirituality, moral values, and religion to the practice of law generally, and the practice of conflict resolution specifically. In this Commentary, I want to focus on two related questions: First, where do our moral values, spirituality, and sense of communion or connection come from? And second, how do values derived from various sources of secular humanism inform our practices? For some of us, organized religion is not the primary source of our commitment to the “moral” values that inform our legal and conflict resolution practices, but other values or values surprisingly similar to religious values do inform our work. This Commentary addresses some of those alternative sources of “spiritual values,” as used by the participants in this Dialogue.

SOURCES OF VALUES

For many of us, spiritual values, morality, and religion are “given,” not chosen, in the sense that we accept what our forebears, our culture, our family, and our racial, ethnic, or religious birthright, or “birth responsibility,” gives us. For others of us, our sense of spiritual place and values has been “chosen” by conversion, commitment, reattachment, or detachment from birthed endowments. For some of us, spiritual values and religion are separate from our professional lives; for others of us, we have sought to inform professional practice either with traditional reli-

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gions¹ or with modern and eclectic self-chosen notions of spirituality,² mindfulness,³ or alternative sources of moral values.⁴

Where do our senses of moral commitments come from? Must moral commitments be religious in nature? What does it mean to speak of "spiritual" values in human action and in professional practice? Can one be moral and spiritual, or have one's professional practice informed by spiritual and moral "values," without being religious?

These are big questions and I will not do them justice here. But I want to "intervene" this Commentary in the otherwise learned discussions in this Dialogue and raise another voice by asking some more questions about what the values are that inform our practices, and suggesting some other sources for their origins and development.

I begin with a brief biographical note since I will focus on "chosen," not given, aspects of spiritual values. I am the daughter of Holocaust survivors, both German, one Jewish, one Catholic, who arrived in the United States during the diaspora of the Second World War. Both of my parents were comfortable in Germany

1. E.g., JOSEPH ALEGRETTI, *THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* (1996); Joseph Alegretti, *Lawyers, Clients and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 FORDHAM L. REV. 1101 (1998); HOWARD LESNICK, *LISTENING FOR GOD: RELIGION AND MORAL DISCERNMENT* (1998); THOMAS L. SHAFFER, *FAITH AND THE PROFESSIONS* (1987); THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* (1981); Russell G. Pearce, *Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 FORDHAM L. REV. 1075 (1998).

2. E.g., Zena D. Zumeta, *Spirituality and Mediation*, 11 MEDIATION Q. 25 (1993) (defining spirituality as "an awareness of the connectedness of all things," and discussing ways to bring it into mediation); STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (1999) (describing the approaches and techniques of seven kinds of spiritually oriented law practices).

3. E.g., Len Riskin, *The Contemplative Lawyer: On the Possible Contributions of Mindfulness Meditation to Law Students, Lawyers and Clients* (unpublished manuscript, on file with author). For an organization doing excellent work in, among other things, organizing meditative retreats for law students, lawyers, and law professors in collaboration with Yale University Law School, see Center for Contemplative Mind in Society, Northampton, Massachusetts at <http://www.contemplativemind.org> (last visited Mar. 17, 2001).

4. For many years, for example, I was associated with a group of legal educators who were using humanistic psychological principles to address "deeper" human values in the law. E.g., *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONAL IDENTITY* (Elizabeth Dvorkin et al. eds., 1981) (considering the impact that work in humanistic education can have on legal education); Jack Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514 (1978) (proposing the use of "humanistic educational methodologies" in law school education as a way to enhance the profession).

before their immigration and after some struggle and harrowing experiences,⁵ became “comfortable” again. But in my family, where the Holocaust was revisited constantly in conversation and retelling of experiences,⁶ the conclusion was not to cling to our different religious traditions,⁷ but to see the harm that religious and racial “belonging”⁸ causes when difference and discrimination turn to hate and violence. For me, religious and racial divisions and differences meant horrific violence, and so my childhood was spent thinking about ways to reduce such human suffering. My parents strongly rejected their own traditional religious birthrights and I was raised in the quasi-secular religious crucible of Ethical Culture in the religious “revival” of the 1950s.⁹

The religion of the Ethical Culture Society, founded by Felix Adler out of the social, political, and religious progressivism of late nineteenth century American optimism, was, in the 1950s, a strange mixture of quasi-religious tenets, such as “God is spelled with two o’s (Good),” and political commitments.¹⁰ Most members in New York also were active in SANE,¹¹ the anti-nuclear movement, and the Civil Rights movement. Children attended the Encampment for Citizenship, a multi-racial summer camp, which sought to teach children tolerance and appreciation for civil rights and international human rights along with a 1950s-acceptable ver-

5. These included *Kristallnacht*, Nov. 9-10, 1938, a 1941 last-boat-out transatlantic passage, much suffering in racial labeling, acts of discrimination, seizure of property and self-respect, and, of course, the death of family members, friends, and lovers. My parents were lucky—they survived and became comfortable again (in family and in economics—the psychological harms are incalculable).

6. All of my grandparents survived to spend twenty years of Sundays at my childhood home telling stories in the German I learned to understand as a child deciphers parental languages.

7. We celebrated the Christian ones—Christmas and Easter—in full pagan and secular splendor, with both German and American traditions. I was born on Christmas Eve.

8. For an eloquent report on modern religious and ethnic wars, see MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* (1993).

9. ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALS AND COMMUNITY IN AMERICAN LIFE* (1985); ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); see also PETER BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* (1967) (describing the history and process of secularization).

10. E.g., FELIX ADLER, *A NEW STATEMENT OF THE AIM OF THE ETHICAL CULTURE SOCIETY* (1904); ALGERNON BLACK, *ETHICAL CULTURE: A LIVING FAITH FOR MODERN MAN* (1963).

11. SANE is the Committee for a Sane Nuclear Policy. E.g., MILTON S. KATZ, *BAN THE BOMB: A HISTORY OF SANE: THE COMMITTEE FOR A SANE NUCLEAR POLICY 1957-1985* (1986).

sion of basically socialistic principles, appropriately labeled an “experiment in democratic processes.”¹² My Sunday School classes consisted of study of many of the world’s religions, including Buddhism, Zoroastrianism, Shintoism, Islam, Catholicism, Judaism, Protestantism, Taoism, and Hinduism. We also read Margaret Mead to learn about the human diversity in culture and living practices, and were introduced to sociology (in which I later majored in college) and humanistic philosophy. The obvious “morality” of this education was not biblical or talmudic doctrinal study and inculcation. Its purpose was to foster a sense of awe at human variation, and a curiosity and thirst for understanding others’ lives, practices, traditions, and cultures. Most importantly, it sought to foster an internalization of something much greater than “tolerance”—“appreciation” for difference as well as disgust for ethnic and religious imperialism, coercion, conversion, violence, and wars. We all worked for peace and disarmament—very important and difficult values to work for in the era of the Cold War—and for civil rights (which is why peace, justice, and harmony always have seemed fused for me in dispute resolution work, not separated or antagonistic, as some have argued they are).¹³

So religious birthrights can be replaced by formative experiences (e.g., the Holocaust) that challenge, as well as reinforce, that into which we are born. For many in my generation, religious sources of values were trumped by political commitments. For those of us who took part in the political movements of the 1960s, including the Civil Rights, feminist, War on Poverty, anti-war, and, more recently, gay rights movements, various versions of “equality” and “justice” were as important to us in any value structure as religious fidelity, chastity, worship, fellowship, and devotion to any deity or form of religious doctrine. As odd as it may seem today in 2001, our “gods” or quasi-religious figures were Karl Marx, Che Guevara, Martin Luther King, and, for me, Susan B. Anthony, Elizabeth Cady Stanton, Simone de Beauvoir, and Michael Harrington (author of *The Other America*).¹⁴ Beginning with Karl

12. ALGERNON BLACK, *THE YOUNG CITIZENS: THE STORY OF THE ENCAMPMENT FOR CITIZENSHIP* (1962) (describing the principles, purposes, history, and ideals of the Encampment movement).

13. E.g., Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993) (arguing that the dispute resolution movement is based on a “harmony ideology” that often has the coercive effect of pacifying participants).

14. MICHAEL HARRINGTON, *THE OTHER AMERICA* (1962). This book is credited with suggesting to President Kennedy the basic blueprint for what became the War on

Marx, these “religious preachers” taught us to see that class injustice, whether organized by caste (race or gender) or by status (slave, laborer, or wife) was systematic, oppressive, and immoral. We saw that human beings could be the authors and agents of their own lives, rather than passively accepting their lots (remember that “religion is the opiate of the people”).¹⁵ Thus, a belief in the centrality and importance of human, not divine, agency¹⁶ was critical to the “faith” of the 1960s. Our tenets of equality and fairness, as well as equity and justice, were informed by a respect both for individualism and a communalism that sought to be far more inclusive than traditional family, religious, or nation-state formations. As political activists of the 1960s organized around labor, race, gender, economic, anti-war, and life-style¹⁷ issues, they formed alternative institutions (communes, group homes, participatory networks, labor alliances, new relationships, and political organizations)¹⁸ that many believed would supplant traditional forms of family, religion, and workplace. These commitments were (and still are, for some) as strong as any of the more traditional pulls of religious or family-inspired morality. There was moral teaching in these movements: people were to be treated as ends, not means; oppression of one person or one class by another was wrong; individuals should be free to self-define their destiny, and human resource allocation should be just and fair.

Feminism taught another set of moral precepts. Some, such as a belief in equal opportunity for individuals and disapproval of oppression and inequality, were consistent with other political move-

Poverty. It was one of the inspirational texts for me in my decision to be a Legal Services lawyer for the poor. For a modern and equally moving account of how Legal Services lawyers are committed to the amelioration of poverty and human and political suffering, see MELISSA FAY GREENE, *PRAYING FOR SHEETROCK* (1991).

15. KARL MARX & FREDERICK ENGELS, *THE COMMUNIST MANIFESTO* (Verso 1998) (1848).

16. Recall that the Enlightenment’s emphasis on human agency and “humanism” was itself considered a counter-religion or counter-faith to the religious teachings it was seen to supplant. “Humanism” was itself a religion for many in the eighteenth century.

17. As a sociology student I wrote a paper in the 1970s suggesting that the social revolution (divorce, changed sexual practices, racial and religious intermarriage, unmarried cohabitation, media access, etc.) likely would have longer lasting societal effects than the “political” revolutionary dreams and hopes of the 1960s. Was I right?

18. Consider the “flowering” of new political organizations like NOW (the National Organization of Women), SNCC (Student Non-violent Coordinating Committee), SDS (Students for a Democratic Society), and the Black Panthers. The political spectrum of these groups ranged from organized legal activity such as that of the NAACP (National Association of the Advancement of Colored People) LDF (Legal Defense Fund), to more radical activity (e.g., the Weather Underground).

ments. Feminism also challenged contemporary thinking, eventually teaching (after some struggle within the movement itself) to valorize certain traditional "feminine" values. These included care for others,¹⁹ mercy,²⁰ concerns for the "needs" as well as instrumental "interests"²¹ of others, and belief in a necessity for the larger society to play a role in sharing the care that any social grouping requires. Women's consciousness raising groups, encouraging the "sharing" of experiences, the telling of narratives about oppression and pain as well as the triumphant stories of freedom gained, were, for many of us, substitutes for more traditional communal and religious gatherings. Women organized such ceremonies as feminist Passover Seders and "crowning" and "croning" rituals to mark different passages in women's lives and to create different kinds of sacred places and celebrations. For many, the Woman's Movement was both political and spiritual—women who were separated from each other by traditional family roles found new kinship and loyalties. Explicitly, in both scholarship and practice, feminists sought to develop alternative value structures while seeking transformed relationships at home and in the workplace. Women reached out with their altered practical and spiritual connections in attempts to affect the larger society in which they were embedded.²²

After the political and cultural revolutions of the 1960s dissipated²³ and were replaced by the more materialistic and selfish 1980s and 1990s, a different form of spiritualism arose, one that drew us inward. Many Americans, seeking spiritual enlightenment, sought solace and different religious experiences in the religious

19. See generally ROBIN WEST, *CARING FOR JUSTICE* (1999).

20. E.g., Carrie Menkel-Meadow, *Portia In A Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) (discussing social conditions of women lawyers and offering alternative values practiced by women lawyers); see also WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1 (depicting Portia, a noblewoman posing as a Doctor of Laws, telling Shylock, a usurer, that mercy should temper justice).

21. E.g., Carrie Menkel-Meadow, *Aha!? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education*, 6 HARV. NEGOT. L. REV. (forthcoming 2001).

22. E.g., KNOWLEDGE, DIFFERENCE & POWER (Nancy Goldberger et al. eds., 1996) (describing different and gendered "ways of knowing theory" and illustrating alternative methods of perceiving and understanding gender and knowledge).

23. We are probably still too close to these movements to analyze them ourselves, though that has not stopped many participant-historians from seeking to explain just what happened to the mass commitments of this era. E.g., TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* (1987); *REASSESSING THE SIXTIES: DEBATING THE POLITICAL AND CULTURAL LEGACY* (Stephen Macedo ed., 1997).

and meditative practices of the East, particularly various forms of Zen Buddhism and a variety of "New Age" eclectic forms of mindfulness and reflective practice. If we could not be successful in changing the conditions of the material world (or alternatively, if we were too "successful" in the material world) we could turn to inner reflection and enlightenment as a source of peace, tranquility, and harmony. We could contemplate and focus on the non-material and spiritual world either as self-defined or as learned in apprenticed years of contemplative practice and study.

So when I think of the places where our moral and spiritual values are learned, I find that more influences than only traditional religious doctrines and practices inform how we think of our place in the world as human beings, citizens, or moral people. The family, religious practice, and life experiences that form political and secular, as well as religious alliances, all affect our consciousness and moral "leaning."²⁴ Thus, I want to suggest that "secular humanism," as I have described at least one version of it (my own) here, is itself a source of spiritual and moral values that informs both the practice of law generally and the practice of conflict resolution particularly. Let me suggest briefly which values I believe are informed by secular humanism and explain why secular humanism, in my view, should be credited, as much as traditional sources of religious, moral, and spiritual learning, with providing informative and inspirational tenets for our practices.

THE VALUES THAT INFORM CONFLICT RESOLUTION PRACTICE

Whatever the discipline from which we choose to recognize our values, I think that all of us at this conference, or readers of this Dialogue, share a sense that our professional practice should be informed with human significance, meaning, and "good" values. "Good" values enhance human flourishing, promote respect for others, allow us to recognize our human commonalities and connections as well as our individual differences, and enable us, through our own actions, to make the world a better place than we found it. In this, lawyers (conceived as human and social problem-solvers) and mediators or conflict resolvers (as peacemakers and

24. Note that I have not discussed secular professional moral norms and rules here which is a bit odd for a legal and dispute resolution ethicist, but in fact, I think such rules and regulations do not form our "moral consciousness." We consult such rules and regulations for guidance or for post hoc rationalization of actions and moral stances that I believe are actually framed, at least initially, outside of these official and regulatory boxes.

healers) can find some common purposes. But it is also important, I think, to trace and consider our differences. Just as there are “false cognates” in languages there are also “false cognates” when we assume that words have the same meaning in different contexts. Litigative lawyering is not the same as mediational lawyering, just as not all religious and spiritual traditions mean the same thing when they speak of “holiness” or “salvation.” So, focusing on my starting place of a more secular experience of humanism and spirituality—expressed as care for the other, as well as the self—and with a heavy dose of political “justice,” I will outline briefly the values that I think are crucial to our practice as dispute or conflict resolvers.²⁵

Conflict resolvers begin with different perspectives on conflict. There is a great deal of talk in our field today about “managing” or “resolving” conflict, and many are drawn to the work of conflict resolution in order to make peace or deal with unproductive conflict. But others, especially those of us from the secular humanist group I have outlined above, were reared in conflict—familial generation gaps, struggles with authority for self-determination and redefinition of the person, fights and arguments with lovers, bosses, and friends over racial and gender equality. The Civil Rights movement included both Mahatma Ghandi’s and Martin Luther King’s “passive resistance” and “non-violent civil disobedience,”²⁶ but it also included a great deal of conflict, some unfortunately physical, and much of it hostile and verbal. Conflict in the contexts of some of those political struggles allowed spiritual realignments as whites joined blacks and some men joined women in these efforts. “We Shall Overcome,” the anthem of the Civil Rights movement, is both a “spiritual” song and a call to action. Thus, some of us see growth and movement, transformation, realignments, social change, and justice emerging from conflict, so that not all conflict is

25. Within our field, “dispute” is usually intended to connote the concrete argument, dispute, or rupture that causes a problem, disagreement, or lawsuit. “Conflict” is the larger relationship or set of issues in which the concrete dispute may be located. Lawyers, mediators, arbitrators, consensus builders, and other dispute professionals work at both levels. Within our own discipline there is healthy disagreement about whether disputes are simply “settled” or whether conflicts or people can be “transformed” through our practice. *E.g.* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (1994); *cf.* Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Practices and Paradigms*, 11 *NEG. J.* 217 (1995).

26. PETER ACKERMAN & JACK DUVAL, *A FORCE MORE POWERFUL: A CENTURY OF NON-VIOLENT CONFLICT* (2000) (describing the significant non-violent conflict political movements of the twentieth century).

bad and not all conflict must be “managed” or “resolved.” I prefer to speak of conflict “handled” or “channeled” (productively). Struggle for liberation is part of *The Bible* and also part of a political story. The search for liberation and autonomy is one of those human universals. So is the search for connection. What is not so universal is how much violence or physical harm we must endure or how much may be justified to right some of the human wrongs we seem to inflict on each other. (What is self-defense and what is aggression at the inter-personal, as well as international, level?) Thus, what we think about the relationship of peace and harmony to justice may inform how we exercise our practice. Sara Cobb’s essay in this Dialogue²⁷ suggests an active, dare I say “ministerial” or “pastoral,” role for the mediator. In this role, the mediator actively engages parties in creating a narrative that brings conflict to the fore so it can be examined, “moralized,” and reconstructed in proposed future actions to alter the relationship of the parties. Conflict is framed and scrutinized in order to examine identity, meaning, roles, and morality and to create change and a more “moral” relationship. The mediator is active, rather than passive, in the creation, description, and use of conflict, all presumably to achieve a higher purpose and a better relationship for the parties (and the larger workplace in which they are embedded).

Even with a great deal of conflict expressed in a mediation or other dispute resolution setting, including litigation, we know we serve a higher purpose in the not-so-linear development of the human species. Mediation, arbitration, negotiation, and yes, even litigation, are substitutes for armed physical violence. We have moved from “trial by combat” to “trial by words.” We hope, if we can deal with the “disputes” among us (both individuals and groups) then maybe we can prevent or discharge some of those disputes that would ripen into the larger “conflicts” that cause war and killing. So we seek peace, if not total harmony, even when we are at our worst in verbal combat.

At our best, conflict resolution professionals seek to express values other than simple “peace,” dispute settlement, or cessation of violence. Many of us prefer the instrumental, Pareto-optimizing²⁸ sense of solving problems in a participatory, open, and party-di-

27. Sara Cobb, *Creating Sacred Space: Toward a Second Generation Dispute Resolution Practice*, 28 FORDHAM URB. L.J. 1017 (2001).

28. Pareto-optimizing means that each party has maximized its own gain without further harm to the other party. It represents the most “efficient” outcome. HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 139 (1982).

rected setting to the binary, third-party neutral structure of litigation or arbitration²⁹ that has routinized or regularized outcomes imposed from on high or from without. For others of us, it is the “reconciliation”³⁰ of human beings or transformation of relationships, which Albie Davis called the “magic” of mediation,³¹ and Sara Cobb calls the “sacred”³² moment of understanding and reorientation to another human being, as well as the self. For those of us who have experienced these moments, they are about changes in individuals and relationships as well as social and political change. They can be about justice as parties reorient themselves in ways that seem more fair and honest and in which they make new promises to each other (the ceremony or ritual of mediation, captured here by Sara Cobb).³³ They may enable people to be further connected to a larger community, not just of two, but of others with whom they are associated—the family, the workplace, or some other community.³⁴

But the secular humanist teachings to which I refer above also lead us to other values. Feminism has asked us to take caring for others seriously, as we recognize that we are not all always equal. As the disability community suggests, we are all “temporarily abled,” most of us requiring care at early and late stages of the life cycle and some of us requiring care for longer periods than that. From our illnesses and differentially abled places, we should acknowledge the interdependence of human beings in all places, including in the family, the workplace, the place of worship, the daily commute, or the gym. We need and depend on each other, and fundamental human “needs” as well as instrumental “interests” need to be recognized and reconciled. We must learn to trust each other while giving and receiving care. Although some rail against the power inequalities in mediation or other forms of alternative dispute resolution (“ADR”), I suggest that mediation and some

29. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981) (describing the elements of the classical adjudicatory and dispute resolution triad).

30. Andrew McThenia & Thomas Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985).

31. Albie Davis, *The Logic Behind the Magic of Mediation*, 5 NEG. J. 17 (1989).

32. Cobb, *supra* note 27.

33. *Id.*

34. E.g., Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community Enabling Mediation*, 44 UCLA L. REV. 1687 (1997) (arguing that “community-enabling mediation” is an effective way for same sex couples to create a marriage-like union and connect to the larger communities, both gay and straight, in which such couples live).

forms of ADR are most appropriate for honestly addressing inequalities and meeting the needs of unequal parties. In mediation, people can recognize and face up to their human responsibilities, not because someone has ordered them to, but because they have come fully to understand and comprehend someone else's reality and limitations.

ADR or conflict resolution practices acknowledge a greater human variability of action than do the ritualized or overly stylized forms of litigation practice. This allows values other than being "right" to be imagined and enacted. Portia's plea for mercy³⁵ or forgiveness, the granting of an apology³⁶ and human acknowledgment of wrongfulness, if not legal fault or blame, all allow the fuller expression of a richer gamut of human actions, emotions, and feelings and we hope, a more humane set of responses.

At the same time, secular humanist movements that see "justice" as equally important a value as forgiveness and reconciliation, remind us that conflict resolution practices must serve many masters. It is not enough to provide a location for a sacred ceremony or a ritual of understanding and reconciliation if injustices remain. Thus, conflict resolution professionals have learned to create their own doctrines that recognize substantive values (equality, liberty, self-determination, equity, and fairness³⁷) as well as process or "ceremonial" values (participation, "voice," and groundrules). And related to this, for me, is the misconception held by many that mediation cannot promise justice because it offers up too much compromise. In this Dialogue, Professor Bush traces the recognition of compromise in the *Talmud*, as a "preference for ADR" over rabbinical judgment.³⁸ The motivation is one I heartily agree with—that the parties are better off coming to their own terms

35. Menkel-Meadow, *supra* note 20; SHAKESPEARE, *supra* note 20.

36. E.g. Jonathan R. Cohen, *Advising Clients to Apologize*, 72 SO. CAL. L. REV. 1009 (1999) (discussing the beneficial role of apologies in dispute resolution); Arthur Rosett & Hiroshi Wagatsuma, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1986) (discussing the different roles that an apology plays in American and Japanese dispute resolution).

37. For what remains, for me, the most eloquent statement of how mediators have values, that include presiding over "fairness" and not genuflecting unnecessarily to "neutrality," see Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981); see also Jennifer Gerarda Brown, *Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions*, 34 VAL. L. REV. 403 (2000) (considering the ethics of mediator activism in environmental ADR cases and discussing whether or not attorneys have an ethical obligation in such cases to ensure that the interests of outsiders are somehow accounted for and expressed).

38. Robert A. Baruch Bush, *Mediation and ADR: Insights From the Jewish Tradition*, 28 FORDHAM URB. L.J. 1007 (2001).

(those they have a hand in making) rather than having to accept a verdict imposed from outside, even if from a wise elder. Compromise, it is said, provides for peace. Adjudication produces winners and losers who will continue to seek rectification (appeal) or wreak vengeance or revenge on each other and so litigation continues the fighting and battles. But I would suggest that our secular humanism has made progress beyond the *Talmud*. Compromise may produce the same sense of arbitrary peace and injustice, if, for example, we simply “split the difference” to achieve peace and closure. Instead, as I have argued in many articles,³⁹ rather than compromise, where each party is likely to feel as if they have still “given up something,” we should seek to meet each other’s needs and interests and not cut the orange⁴⁰ or chocolate cake⁴¹ in half. Professor Bush would suggest that compromise includes the deeper religious value of “charity”—that we learn to give up more than we have to when we compromise and learn to “lose our self” in recognition of the other.⁴² I agree that generosity is a value we seek to foster in ADR, but I wonder whether “giving up” to the other side may encourage feelings of patronization, resentment, and “unjust enrichment.” Achieving a “fair” result, rather than a compromise, appeals to me as a more appropriate expression of the values that inform good mediation (or negotiation). This is what I believe Rabbi Hillel meant when he said, “If I am not for myself, who will be for me?” and “If I am only for myself, what am I?”⁴³ We can seek ways for righteousness, justice and recognition of both (or all)⁴⁴ parties to a mediation.⁴⁵ Compromise need not mean “meet-

39. E.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

40. ROGER FISHER & WILLIAM URY, *GETTING TO YES* 73 (2d ed. 1991).

41. Menkel-Meadow, *supra* note 39, at 781.

42. Bush, *supra* note 38.

43. *PIRKE ABOOTH: SAYINGS OF THE FATHERS* 1:14 (Isaac Unterman, ed. & trans., 1964).

44. It is important to recognize that many legal and other problems that are brought to ADR are no longer about two parties only. Many modern legal problems involve multiple parties and multiple stakeholders. E.g., LAWRENCE SUSSKIND ET AL., *THE CONSENSUS BUILDING HANDBOOK* (1999) (describing and illustrating the multi-party, multi-issue social and legal disputes common in our culture today, including environmental, municipal finance, health care, abortion, and resource allocation problems); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM & MARY L. REV. 5 (1996) (discussing the weaknesses of the modern binary adversarial system and possible approaches to address its deficiencies).

45. See Menkel-Meadow, *supra* note 25, for my argument that transformation, empowerment, and recognition, the “spiritual” values of ADR, are not inconsistent with each other and most often are paired with the instrumental “problem-solving” aspects

ing halfway” or “giving something up.” Solutions can be reached in which parties seek to meet each other’s complementary needs without “giving in.”⁴⁶

To the extent that mediation ideology contains within it the value of respect for the other, or reciprocity, then one should consider the Golden Rule as a useful and, perhaps, almost universal, expression of how parties (and their lawyers)⁴⁷ might deal with each other in dispute resolution settings. Treating others as one would want to be treated suggests both substantive and process values informed by both “spiritual respect” and “secular justice” concerns. When reciprocity works most effectively, it encourages a stance of mutual respect and real, as well as “active, listening” to the other. It also facilitates the kind of re-ordered private norm creation that caused one “god” of mediation (Lon Fuller) to suggest that mediation’s basic purpose is its ability to “reorient the parties to each other.”⁴⁸

Thus, to conclude, mediation and various other forms of ADR practices are informed by some basic core values, accepted almost universally by different religious and spiritual disciplines. As a form of peacemaking, mediation with its emphasis on healing, human understanding, apology and acknowledgment of wrong, and anticipation of improved future relationships expresses human possibilities for transcendence in conflict resolution. Mediation also, however, as I have argued here, serves important secular humanist values and we should not forget these. If we are to empower, rec-

of ADR. One is unlikely truly to solve a problem without some recognition and shared worldview (at least for purposes of making an agreement), and empowerment and recognition cannot really occur if some outcome is not achieved that makes the parties feel whole, as well as holy.

46. The moral conception of compromise is actually quite complex, connoting sometimes weakness and arbitrariness in “giving up,” but also sometimes facilitating continued relations. Our concerns are when “compromise” seems to connote giving up a moral principle, unless the larger moral principle is preserving the greater union or relationship. For a longer discussion of compromise, see generally COMPROMISE IN ETHICS, LAW AND POLITICS (J. Roland Pennock & John W. Chapman eds., 1979) and Mary Parker Follett, *Constructive Conflict*, in MARY PARKER FOLLETT: PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920’s 67 (Pauline Graham ed., 1996). For the role of compromise in political constitution making see, for example, JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 57 (1996).

47. For my argument that lawyers ought to apply the Golden Rule when dealing with their own clients, see Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761 (1990).

48. Lon Fuller, *Mediation: Its Form and Its Functions*, 44 SO. CAL. L. REV. 305, 308 (1971).

ognize, and conciliate with others, we also must have justice, good faith, honesty, and some transparency about our processes and the outcomes they create. Although there are many aspects of mediational values that lend themselves to the “do be” list (positive things), we also must take account of the “don’t be’s” (remember the Ten Commandments are mostly exhortations of what not to do—“thou shalt nots”). ADR or mediation should not be used to pacify legitimate grievances or conflicts that need to be expressed. ADR should not produce “unjust” outcomes (whatever those might be, both for the parties affected by a particular dispute, as well as those inside of it).⁴⁹ As we seek to focus on the future, we cannot forget the past.⁵⁰

If mediation is to express fully the values we hope for it, we face some interesting, if daunting, tasks ahead. First, given the diversity of “sources” of values for religious, spiritual and secular humanist inspirations for ADR practices, should we simply acknowledge a multiplicity of sources and “let a thousand flowers bloom?” What if one person’s sacred recognition is another’s feeling of patronization? What ought the role of the mediator to be? Facilitator of compromises? Active participant in morally constructed narratives? Peaceseeker? Ceremonial healer? Should we eliminate mechanistic groundrules (e.g., turntaking, or no interruptions) to allow greater spiritual and more spontaneous feelings to be expressed? Discussion about values informing professional practices often devolve into discussions about prudence and judgment versus rules. I have spent the last five years drafting ethical standards and principles for the practice of ADR in both individual and provider group settings⁵¹ and I remain agnostic on the question of whether

49. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2696 (1995).

50. For me, Trina Grillo eloquently expressed the concern that peace and future orientedness in mediation was disregarding the past in an unjust way. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); see also Carrie Menkel-Meadow, *What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life*, 81 MINN. L. REV. 1413 (1997) (reminding mediators to focus on the past, as well as the future, when reconciling parties to each other). Many others, like Sara Cobb, are now exploring the importance of fully elaborated narratives, including the reporting of past harms and pains, as necessary to a truly healing practice of mediation and reconciliation. For an interesting work exploring the benefits and drawbacks of various forms of compensatory and non-compensatory measures to redress the suffering of victims of mass atrocities, see MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

51. Carrie Menkel-Meadow, *Ethics in ADR: The Many “Cs” of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979 (2001).

good values, good people, market forces, or elaborate ethical rule systems ultimately will control our practice.

Second, it is one thing for us to focus on the "good values" that inform the best of conflict resolution or mediation practice. But as long as the practice of law continues to reward "hired guns," bottom-lines, or simply people who prefer a good fight or a good argument,⁵² the healing values of lawyering must be transmitted not only to the mediators, but to the lawyers who appear in mediation and their clients. This is one place that legal work and education is heading, but instead of our law schools teaching the "healing arts," or problem solving, I see courses on "mediation advocacy," an oxymoron that promises to continue traditional adversarial combat values and import them into newer forms of conflict resolution.

CONCLUSION

It seems important to me that the sacred, religious, and spiritual values that inform most of what is good about conflict resolution should not be cabined to the church, synagogue, mosque, or zendo. To achieve peace, justice, reconciliation, intersubjective understanding, solutions of good quality to conflicts, as well as productive uses of conflict, we must consider the secular humanist values of self-determination and autonomy, as well as interdependence and mutual caring, both when they coincide with religious values, and also when they differ. As a member of the Ethical Culture Society, and as a member of the human race, I still believe that "god" is spelled with two "o's." What that means in lawyering and conflict resolution practice remains to be elaborated. The challenge will be to see whether we can join pursuit of connection, communion, and collective meaning with autonomy, self-determination, and justice. Good conflict resolution practice recognizes that when ADR works, our knowledge and understanding transcend different conceptions of facts, interpretations, and meaning-making systems. We find value in the valuing of our fellow human beings.

52. Despite all the claims that lawyers are dissatisfied with their work, see Joseph Allegritti, *A Christian Perspective on Alternative Dispute Resolution*, 28 *FORDHAM URB. L.J.* 997 (2001), many lawyers I know still claim to love their work because they "love to win," "love to make a good argument," "love to cut a good deal," "fight for justice," etc. Perhaps someone ought to explore the secular, not-so-humanist, values that still motivate many conventional lawyers. And this, of course, does not include the younger generation, many members of which do not even want to practice law if there are other ways of making a more comfortable and bigger living.

